

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**





BRIEF FOR APPELLANT AND  
JOINT APPENDIX

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IN THE  
**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 12,279**

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SAMUEL HERMAN, *Appellant*,

v.

WHITNEY GILLILLAND, PEARL CARTER PACE and HENRY J.  
CLAY, as members of the Foreign Claims Settlement  
Commission of the United States, *Appellees*.

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**Appeal from the United States District Court  
for the District of Columbia**

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United States Court of Appeals  
For the  
District of Columbia Circuit

FILED AUG 31 1954

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### STATEMENT OF QUESTIONS PRESENTED

- (1) Whether, in view of *Herman v. Acheson*, 108 F. Supp. 723, affirmed *Herman v. Dulles*, 205 F. 2d 715, the defense or plea of *res judicata* lies in this action.
- (2) Whether, when it is conceded by the appropriate administrative officials that members of an administrative tribunal who presided at a disciplinary hearing, decided the case, and invoked the severest sanction possible against an attorney, were activated by personal bias, prejudice and malice, it was arbitrary and capricious and an abuse of discretion for such officials, upon petition duly made, to refuse to reopen the proceeding, or to grant a new and fair hearing on the merits.



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Appeal from the United States District Court  
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**BRIEF FOR APPELLANT**

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**JURISDICTIONAL STATEMENT**

This case was originated by Complaint filed in the United States District Court for the District of Columbia, being Civil Action No. 5510-53 (JA 2-8), seeking review of an order of the Secretary of State issued on November 19, 1953, affirming a denial, on September 14, 1953, by the International Claims Commission of the United States (herein-

after referred to as the "Commission") of a petition to reopen a disciplinary proceeding against appellant, an attorney, on the ground of newly discovered and proffered evidence of bias, prejudice and malice. This is an appeal from an order of the District Court entered on June 17, 1954 (JA 15-16) granting the Secretary of State's motion for summary judgment (JA 14) and denying appellant's cross motion for summary judgment (JA 14-15). Notice of Appeal was filed on June 18, 1954 (JA 20-21). Jurisdiction below was based on 28 U.S.C.A. § 1331 and § 10 (c) of the Administrative Procedure Act, 60 Stat. 236, 5 U.S.C.A. § 1001 *et seq.*

### STATEMENT OF THE CASE

Appellant, a member in good standing of the bars of Indiana, Illinois and the District of Columbia, was admitted to practice before the Commission on January 23, 1951. On September 18, 1951, the Commission issued a show cause order charging appellant with having violated certain Canons of Professional Ethics of the American Bar Association. There being no rules published, or in effect, governing disciplinary proceedings by the Commission, appellant immediately sought guidance from the Commission as to how to proceed. An answer was filed on October 23, 1951, under oath, supported by affidavits of witnesses, substantially denying and refuting the charges. Failing to promulgate rules, the Commission forced appellant to file a series of motions as his only avenue of approach in obtaining justice short of waiving a fair hearing, confessing guilt and throwing himself on the mercy of the Commission. Among other things, appellant moved the Commission to certify the proceeding to the Grievance Committee of the United States District Court for the District of Columbia in order that a fair and expeditious hearing under established procedure would be afforded. As in all other of appellant's requests, the Commission refused.

A hearing was ordered held on January 23, 1952. The Commission's rules governing the proceeding were pub-



lished on the same day. Appellant appeared, and, on advice of counsel, stood mute in protest against deprivation of rights.

Thereafter, the hearing proceeded before the three Commissioners in person (Chairman Marvel, Commissioner McKeough, Commissioner Baker). On February 18, 1952, the majority of the Commission (Chairman Marvel and Commissioner McKeough) issued a fifteen page opinion, which included fourteen findings of fact; a conclusion that appellant had violated Canons 16, 27 and 28 and an order invoking the severest punishment within the power of the Commission, i.e., revocation forever of appellant's right to appear in representation of claimants before the Commission.

The minority of the Commission (Commissioner Baker) dissented to the findings, conclusions and order. He found technical violations of Canons 7, 16 and 27. He concluded that the sanction invoked by the majority was not warranted and was "unduly harsh and severe in view of the fact that such conduct does not involve anything which is dishonest or anything which is prohibited by law, and also because of the fact that insofar as this record is concerned his conduct as a lawyer and his personal as well as professional honor and integrity has never before been questioned." Commissioner Baker concluded that "the ends of justice will best be served if the respondent is officially and properly censured and reprimanded by this Commission for his conduct in the matters specified."

Pursuant to the Commission's rules, appellant thereafter appealed to the Secretary of State who, in turn, referred the matter to a committee of the District of Columbia Bar Association for recommendation. One member of the Committee recommended that the order be vacated. Two members recommended that the order be affirmed "to expedite a judicial determination as to the applicability of the Administrative Procedure Act." On July 3, 1952, the Department of State ruled that "in accordance with the recommendation of the committee, the Order of the International

Claims Commission has been affirmed". An administrative stay was granted pending initiation and completion of judicial review. Appellant brought action in the District Court seeking judicial review. On November 17, 1952, the District Court granted summary judgment for the Secretary of State, *Herman v. Acheson*, 108 F. Supp. 723. This Court stayed the Secretary of State's order of July 3, 1952, pending its decision, but affirmed the lower court on June 4, 1953, *Herman v. Dulles*, 205 F. 2d 715.

Two official requests for the resignations of Chairman Marvel and Commissioner McKeough having been refused, the President, effective June 30, 1953, terminated the terms of office of the two Commissioners, Commissioner Baker having previously resigned. The Department of State announced that such termination was for failure of performance. Because of the publicity attendant upon such termination, new and important evidence was discovered by appellant as to the personal bias, prejudice and malice of Chairman Marvel and Commissioner McKeough against appellant. On August 3, 1953, appellant lodged with the Commission a Petition to Reopen Proceeding, as provided in the Commission's regulation set out below, in which there was proffered newly discovered evidence of such personal bias, prejudice and malice in Chairman Marvel and Commissioner McKeough as to require that their decision and order be set aside pending (1) a hearing on the issue of bias, prejudice and malice, and (2) a new hearing on the merits. Being duly advised of the filing of such Petition and receiving a copy thereof, this Court stayed its mandate in *Herman v. Dulles*, *supra*, until October 12, 1953, pending consideration thereof by the Commission (JA 4).

Two acting Commissioners having come into office, the Commission, on September 14, 1953, without affording appellant a hearing, in a single sentence, with complete absence of findings, denied the petition on the ground "that the new evidence described in the petition as proposed to be offered, if admitted, and if of full evidential purport as represented, would in no way contradict, dispute or impair

the weight of evidence of record ample to support and sustain the . . . decision and order" (JA 4).

On October 26, 1953, appellant filed with the Secretary of State a petition for review of the aforesaid order of the Commission (JA 4-5) and asked for a hearing thereon. Without affording a hearing, the Secretary of State on November 19, 1953, affirmed the Commission's order (the text of the Secretary's decision is set out at JA 8-11). An administrative stay was granted to permit judicial review.

Neither the Commission nor the Secretary of State questioned the showing of bias, prejudice and malice. Both adopted the major premise that the bias, prejudice and malice of the two Commissioners who presided over the hearing, made findings of fact, rendered the decision and issued the disciplinary order providing for the maximum punishment, could be proved. For the purposes of this case, the bias, prejudice and malice have been conceded by the Commission and the Secretary of State.

The Complaint (JA 2-8) below was filed on November 30, 1953, and on that day, counsel for the Government present, Judge Pine ruled that he was prepared to sign a temporary restraining order unless the Secretary of State agreed to "stay his hand" pending hearing on a preliminary injunction. It was orally so stipulated. Counsel for the Government had argued two points in opposition: (1) *res judicata*; (2) lack of abuse of discretion. On December 21, 1953, briefs having been filed, the matter came on before Judge Keech on motion for preliminary injunction. After full argument, Judge Keech on that day granted a preliminary injunction (JA 11) restraining enforcement of the Secretary of State's order of July 3, 1952. Counsel for the Government again advanced, by brief and orally, the arguments theretofore advanced before Judge Pine and contended that a preliminary injunction should be denied because "it is abundantly clear that plaintiff is unlikely to prevail at a final hearing on the merits." In rejecting the Government's contentions, Judge Keech ruled from the bench: (1) the issue in the case was the effect of bias, i.e.,

whether bias in administrative adjudicating officers contaminates the record per se and vitiates the administrative proceeding; (2) in respect of such vitiation of prior administrative proceedings, bias did not differ from fraud; (3) a judgment based on judicial review of a biased or fraudulent administrative proceeding could not be *res judicata* of a subsequent action; (4) the Secretary of State's orders of November 19, 1953, and July 3, 1952, were inextricably intermingled, and, in reviewing the order of November 19, 1953, the power of the court of equity must perforce extend to the order of July 3, 1952, the Secretary of State having threatened on November 19, 1953, to put into effect his order of July 3, 1952; (5) appellant would suffer irreparable injury unless injunctive relief were afforded.

On January 29, 1954, the Government filed an Answer in which material denials of fact were made (JA 12-13). The case was calendared for trial. Thereafter, despite its Answer, the Government, on May 3, 1954, filed a motion for summary judgment (JA 14), and appellant, on May 11, 1954, responded with a cross motion for summary judgment (JA 14-15). The court below, through Judge Tamm, on June 14, 1954, without opinion or findings, granted the motion and denied the cross motion (JA 15-16). This appeal followed. The members of the Foreign Claims Settlement Commission, having succeeded, on July 1, 1954, to the functions of the Commission and the Secretary of State, have been substituted, by order of this Court, as appellees.

### REGULATION INVOLVED

The pertinent provision of the rules of the International Claims Commission of the United States is set out in 16 F.R. 693, 695, January 23, 1952, as follows:

§ 303.30 *Reopening*. Any attorney who has been censured or suspended or his right to appear has been revoked may make written application to the Commission to have the order of suspension or revocation vacated or modified upon the ground (a) of newly discovered evidence, or (b) that important evidence is



now available which the applicant was unable to produce at the original hearing by the exercise of due diligence . . . Such application must set forth specifically the precise character of the evidence to be relied upon in its support and shall state the reasons why the applicant was unable to produce it when the original charges were heard. If the Commission after due consideration of the application shall deem it sufficiently meritorious to warrant a hearing the Commission shall set a time and place for such hearing and give due notice thereof to the applicant . . .

### STATEMENT OF POINTS

1. The District Court erred in not finding that the defense or plea of *res judicata* does not lie in this action.

2. The District Court erred in not finding that the order of the Secretary of State of November 19, 1953, was arbitrary, capricious and an abuse of discretion.

3. The District Court erred in not granting appellant the relief sought.

### SUMMARY OF ARGUMENT

Appellant complains of the order of the District Court granting the Government's motion for summary judgment and denying appellant's cross motion. This appeal involves the basic question of whether the effect of bias, prejudice and malice, when shown or conceded, is to contaminate an administrative record and to vitiate an administrative order based thereon. The Government, below, pleaded *res judicata* because of *Herman v. Acheson, supra*, affirmed *Herman v. Dulles, supra*.

1. The effect of bias, prejudice and malice was never in issue directly or indirectly in the first action and could not have been in issue, or necessarily involved, since the issue first arose, in a new administrative proceeding, on the basis of evidence newly discovered after the above decisions had been rendered. Between the time of the first judgment and the affirmance thereof by this Court, and the present action,

the Secretary of State's order of November 19, 1953, intervened, creating a new situation. The judgment in the first action did not constitute an adjudication of the effect of bias, prejudice and malice, which adjudication is essential in the present case. The present action involves no inquiry into the merits of the former judgment but stands on an independent footing.

Assuming, *arguendo*, that the issues in the two actions are the same, bias in an administrative proceeding, like fraud, vitiates and nullifies the proceeding and a judgment based on the judicial review of biased, like fraudulent, administrative proceedings cannot, in equity, be *res judicata* of a subsequent action.

Accordingly, the defense or plea of *res judicata* does not lie.

2. Bias, prejudice and malice having been conceded for the purposes of the case by the Commission and by the Secretary of State, the effect thereof was to contaminate the administrative record and to vitiate the proceeding. A fair hearing was required and could not, under the Fifth Amendment, be afforded by quasi-judicial officers activated by bias, prejudice and malice.

The law does not speculate on the consequences of bias once it is shown or conceded. It is deemed prejudicial per se. *National Labor Relations Board v. Air Associates*, 2 Cir. 1941, 121 F. 2d 586, relied upon by the Secretary of State as authority for his order of November 19, 1953, is inapplicable, has never been followed, and is contrary to the great weight of authority, including the decisions of this Court.

Assuming, *arguendo*, that in addition to the fact of bias, prejudice and malice, prejudicial harm ensuing therefrom must be proven, the charges were not conceded by appellant even though he stood mute, a full answer, under oath, with accompanying affidavits, having been filed. Appellant was entitled to an impartial determination by the triers of the facts. Even if the facts are assumed to have been conceded, the case involved the exercise of discretion by the Commission in the possible imposition of a penalty and appellant,

under our system of government, was entitled to have a tribunal not activated by personal bias, prejudice and malice determine whether or not a sanction should be imposed and, if so, whether it should be censure, suspension or revocation.

Accordingly, the Secretary of State's order of November 19, 1953, was arbitrary, capricious and an abuse of discretion.

The District Court insofar as it granted a preliminary injunction based on the foregoing was clearly correct. We submit that when another judge of that court ruled to the contrary in another hearing, the District Court fell into error and should be reversed.

### ARGUMENT

#### 1. Review of the Secretary of State's order of November 19, 1953, is not precluded by the doctrine of *res judicata*

The single issue raised by the Complaint in this action is a new issue which emerged out of the Secretary of State's order of November 19, 1953, i.e., whether the effect of the conceded bias of the majority of the Commission was to contaminate the record and vitiate the administrative proceeding. The Government, before the lower court, because of *Herman v. Acheson*, 108 F. Supp. 723, affirmed *Herman v. Dulles*, 205 F. 2d 715, preferred the view that the single issue was *res judicata* and that the merits need not be approached. The Commission, on September 14, 1953, and the Secretary of State, on November 19, 1953, relied neither on *res judicata* nor on any equivalent concept. We suggest that this was because the necessary elements did not exist. The Government's position below was an afterthought. In any event, it had no merit.

The applicable rule in this jurisdiction has been stated by this Court in *Hines v. Welch*, 57 U.S. App. D.C. 371, 23 F. 2d 979, 984, as follows:

"... [the] bar of estoppel only extends to issues which were necessarily involved in a decision of the former

case or controversy in question, and not to other collateral issues, or issues unnecessarily made and adjudicated. It was said in *Cromwell v. County of Sac*, 94 U.S. 351, 356, 24 L. Ed. 195:

'It is not believed that there are any cases going to the extent that, because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action.'

"It was early announced in *Hopkins v. Lee*, 6 Wheat, 109, 5 L. Ed. 218:

'Under this rule, the decree in these cases was proper evidence, if it decided or professed to decide, the same question which was made on the trial at law. For to points which came only collaterally under consideration, or were only incidentally under cognizance, or could only be inferred by argument from the decree, it is admitted the rule does not apply.'

"It is believed that there are no sound authorities which differ from the rule thus announced. It has been followed in this jurisdiction. *Tribby v. O'Neal*, 39 App. D.C. 467, *Carmody v. Simpson-Sullivan Co.*, 44 App. D.C. 39; *In re Curtiss*, 46 App. D.C. 183."

Only matters actually litigated and determined in the prior action cannot be relitigated in the later action. *Baltimore Steamship Co. v. Phillips* (1927) 274 U.S. 316, 319; *Mercoird Corporation v. Mid-Continental Investment Co.* (1944) 320 U.S. 661, 671; *Restatement of Judgments*, § 68 (2); Scott, *Collateral Estoppel by Judgment* (1940) 56 Harv. Law Rev. 1; Von Moschzisker, *Res Judicata* (1929) 38 Yale L. J. 299, 311-312. The issue of the effect of bias



and prejudice, where conceded on the basis of proffered proof, was first discovered by appellant and raised *after* the judgment in the first action had been affirmed by this Court. It had not been actually litigated and determined in the first action, *Herman v. Acheson*. It had not been pleaded or proved. The brief mention in Paragraph 9 (m) of the Complaint in that action, i.e., that it was "reflected" in the Commission's findings, represented the unconfirmed suspicion of appellant's counsel that only Commissioners having actual ill-will towards appellant could, in reason and good conscience, have conducted themselves as they did. Defendant, in that action, neither admitted nor denied its existence. Thus, neither the proof of bias, nor the effect of such bias, were put in issue or directly determined in the first action, nor was the judgment, in any manner or respect, rendered thereon.

A reading of the opinions of this Court and of the court below, in the first action, will so indicate. There is not an iota of language in either opinion which supports the proposition that the judgment in the first action adjudicated or determined the issue which lies at the heart of the present action, i.e., the effect of conceded bias. The sole language in *Herman v. Dulles*, *supra*, employed by this Court which might conceivably bear upon the subject is the following:

"In revoking appellant's right to appear before it the Commission exercised its discretion 'after fair investigation, with such notice, hearing and opportunity to answer . . . as would constitute due process.' *Goldsmith v. Board of Tax Appeals*, *supra*, at 123."

The present action involves no inquiry into the merits of the former judgment, based, as it was, on a record in which neither the proof nor the effect of conceded bias and prejudice was an issue and in which the key issue was the applicability of the Administrative Procedure Act of 1946 to disciplinary proceedings. By this test, the defense or plea of *res judicata* must fail. *Pippin v. United States*, (1941) 74 U.S. App. D.C. 131, 121 F. 2d 98.

The Secretary of State and the Commission entertained appellant's petition to reopen as an independent action, administratively, under Sec. 303.30 of the Commission's rules, as, in fact, it was. The present case is grounded upon judicial review of the Secretary of State's order of November 19, 1953, which order intervened between the judgment in *Herman v. Acheson*, *supra*, affirmed *Herman v. Dulles*, *supra*, and the present action, creating a new legal situation. The prior judgment was thereby precluded from operating as an estoppel. "It is the general rule that *res judicata* is no defense where between the time of the first judgment and the second there has been an intervening decision . . . creating an altered situation." *State Farm Insurance Co. v. Duel* (1944) 324 U.S. 154 at p. 162. Also, *Blair v. Commissioner of Internal Revenue* (1937) 300 U.S. 5, 9; *Commissioner of Internal Revenue v. Sunnen* (1947) 333 U.S. 591, 597-602; 2 *Freeman on Judgments* (5th ed. 1925) § 713; 30 Am. Jur., Judgments, § 206 and cases cited.

The present action is a different cause of action and stands on an independent footing. It cannot be equated to, or merged in, the first action, merely because, *inter alia*, appellant sought in the first action, the same relief which he seeks in the second action (and obtained by way of preliminary injunction), i.e., injunctive relief against the Secretary of State's order of July 3, 1952.

Appellant, the first action having been decided, was faced with a new situation based on newly discovered facts. As was his right under Sec. 303.30 of the Commission's rules, appellant sought, before the Commission (a) a hearing on the issue of bias, in which the Commissioner's subpoena powers could be utilized, and, if bias were found, a new hearing on the merits; or (b) a new hearing on the merits. All requirements were met but relief was denied on arbitrary and capricious grounds. Thereafter, the Secretary of State issued the order of November 19, 1953, affirming the Commission's action also, we submit, on arbitrary and capricious grounds. Had the Secretary of State stopped there and continued the then existing stay of his order of

July 3, 1952, appellant would have sought judicial review of the order of November 19, 1953, without asking for injunctive relief, perhaps in an action for declaratory judgment alone. But the Secretary of State, after affirming the Commission, went on and threatened, in his order of November 19, 1953, to put into effect, within fifteen days, his order of July 3, 1952. Thus the Secretary of State's orders of November 19, 1953, and July 3, 1952, were inextricably intermingled as Judge Keech found. Against this threatened irreparable injury, appellant had no other recourse but to seek, in addition to declaratory judgment, injunctive relief. Since injunctive relief is not sought or afforded *in vacuo* but as against specifically threatened or continued injury, appellant, sought restraint of the very injury threatened in the order of November 19, 1953, i.e., application of the Secretary of State's order of July 3, 1952. The order under attack in the present action is the order of November 19, 1953, and, under challenge, is the ground asserted by the Secretary of State in support thereof. The doctrine of *res judicata* does not forbid review of the order of November 19, 1953.

A further and independent ground exists, accepted by Judge Keech below in granting preliminary injunction, precluding the Government from seeking refuge in the doctrine of *res judicata*. Assuming, *arguendo*, that the elements of *res judicata* exist as to this action, a court of equity will not permit a judgment based upon judicial review of an administrative record contaminated by bias, prejudice and malice to forestall equitable relief in a second action. In this respect, bias is equivalent to fraud. Where fraud exists, the public policy underlying the doctrine of *res judicata* disappears and the doctrine loses its meaning and purpose. The principle of *res judicata* cannot be invoked to sustain fraud; 2 *Freeman on Judgments* (5th ed. 1925) § 731; 30 Am. Jur., Judgments, § 202 and cases cited; since equitable relief is available against a judgment fraudulently obtained, *Riggs v. Loweree* (1947) 189 Md. 437, 56 A. 2d 152, 156. Compare Rule 60 (b), Federal Rules of Civil Proced-

ure, in which fraud is a ground for relief from a final judgment.

What is true of fraud is, under the circumstances of this case, true of bias, prejudice and malice. The underlying rationale is the same both in logic and public policy. Thus the *Restatement on Judgments* states (§ 118):

“Subject to general equitable considerations, relief from a valid judgment will be granted to a party to an action injured thereby, if in the action he had no reasonable opportunity *to have determined impartially a meritorious claim or defense which he had.*” (Emphasis supplied.)

2. No contention was made below in support of the motion for summary judgment that appellant, before the Commission, by his petition to reopen, failed successfully to impute bias to the former Commissioners who decided his case.

The Government, in support of its motion for summary judgment below, nowhere contended that bias was not successfully imputed, in appellant's petition for reopening, against the former Commissioners who decided his case. In both the Commission's order of September 14, 1953, and the Secretary of State's order of November 19, 1953, the bias of the previous Commissioners, based on appellant's showing and proffered evidence, was assumed. It was conceded and appellant was not afforded an opportunity, at a hearing, to present the actual evidence, which existed, of the bias. Neither the Commission nor the Secretary of State concluded that appellant's proffered evidence was insufficient to establish that bias existed in the disciplinary hearing. Had they have been in a position to have declared that the proffered evidence could *not* establish bias, they most assuredly would have so found. Having so found they could, conceivably, have adopted a *fortiori*, an *arguendo* position involving an assumption for the purposes of arriving at *another ground* for denying the requested relief, i.e., assuming bias to have been proven, nevertheless a new hearing would not be afforded because



of the doctrine of *National Labor Relations Board v. Air Associates, supra*. They made no finding that bias could not be established. On the contrary, the inference is virtually conclusive that both the Commission and Secretary of State agreed that bias had been or could be established. It follows that this Court, like the lower court, is, in the present posture of the case, not concerned with the *proof* of bias but only with the *effect* of bias. The latter was the basic issue at the hearing on preliminary injunction and at the final hearing below. On this issue, i.e., that bias in adjudicating officers contaminates the administrative record *per se* and vitiates the administrative proceeding, appellant, we submit, must prevail.

**3. National Labor Relations Board v. Air Associates, supra, upon which the Secretary of State relied, far from being "closely analogous" to the present case, is clearly distinguishable.**

In *Air Associates*, an order of the National Labor Relations Board was challenged because the trial examiner was biased and prejudiced. For the purposes of the case, the bias and prejudice was assumed. It appeared that the trial examiner made no decision or recommendation and his tentative findings were disregarded by the Board which, ignoring the trial examiner, and acting solely and directly on the evidence in the record, made its own findings and decision. The Court held that, under the circumstances, the trial examiner was like a master appointed merely to take and report testimony. Absent other prejudicial error such as exclusion of evidence, intimidation of witnesses and the like, the bias and prejudice of the trial examiner was harmless.

The holding was narrowly limited to the facts since the court was aware that the ruling was exceptional and ran counter to a basic tenet of Anglo-Saxon jurisprudence and, in fact, a universal concept of justice, i.e., that no trial or hearing was fair if the judge was biased and prejudiced.

Thus, Judge Frank opened his discussion by stating (p. 588):

“ . . . [the bias of a trial examiner would be] a serious matter if there was such bias and (equally important) if it affected, or probably affected, the Board's findings and order.

“ If there were equivalent factors here [such as misconduct of a trial judge], the record would be contaminated and unquestionably the Board could not lawfully act on it. But here the fact finder was the Board, not the trial examiner”.

The quotation from *Air Associates* relied upon by the Secretary of State in his order of November 19, 1953 (JA 8 at 10) is, in fact, in the following context (p. 590):

“ It is conceivable that, even in a trial of a judge without a jury, the conduct of the judge might be so unfair as to give rise to sufficient inference of a prejudice in his findings to warrant a reversal of a judgment entered by him . . . ”

If *Air Associates* stands for the proposition that bias is not prejudicial per se and independent prejudice and harm must be shown to upset the proceeding, it is directly challenged by authoritative contra rulings in various of the Federal Circuits, including this Circuit. Handed down in 1941, *Air Associates* was not appealed to the Supreme Court and has never been followed or cited in support of any effort to sustain findings, decisions or orders of biased judges, trial examiners, hearings officers or the like. In the one case since 1941 where *Air Associates* was advanced to justify an action taken on the basis of a proceeding before a biased hearing officer, it was rigidly limited to its own facts, distinguished and not applied, *National Labor Relations Board v. Phelps* (CCA 5, 1943) 136 F. 2d 562, where Judge Hutcheson said (at p. 567):

“ Finally *Whitaker v. McLean*, 73 App. D.C. 259, 118 F. 2d 596, . . . holds that where a judge made remarks, though in the absence of the jury, which caused the



plaintiff's attorney to express the opinion that he could not very well go on because the judge's remarks evidenced bias and prejudice, the court should reverse because of the remarks. It did this in the interest of a fair trial though it stated that its impression was the claim on which the plaintiff sued was probably without merit. Nor is the effect of the prejudice avoided here as it was held in some of the cases cited in the Board's brief, *N.L.R.B. v. Ford*, 6 Cir. 114 F. 2d 905; *N.L.R.B. v. Air Associates*, 2 Cir. 121 F. 2d 586, by the fact that the trial examiner made no decision and his tentative findings were disregarded by the Board. *Here, unlike in those cases, the examiner made full and lengthy findings and recommendations, the Board completely adopted his findings and put all of his recommendations, into effect. More, instead of, as it usually does, making detailed findings of its own, it contented itself with the very brief statement in which it precisely accepted the findings and reasoning of the examiner and made this decision in effect its own.*" (Emphasis supplied.)

The facts in the instant case are clearly different than those in *Air Associates*, and by the court's standards in that case, as well as the standard in *N.L.R.B. v. Phelps*, *supra*, quoted above, remove the instant case from the scope of the *Air Associates* ruling. In brief, the administrative hearing in the instant case was conducted by the biased Commissioners themselves, not by trial examiners.

- A motion by appellant that a hearing examiner be designated was, in fact, denied. The biased majority of Commissioners (Marvel and McKeough) made elaborate findings of fact, issued an opinion, rendered a decision, and promulgated an order invoking the severest punishment possible. Commissioner Baker, who also presided and observed the attitude, tactics and demeanor of the majority, as well as the demeanor of the witnesses, dissented from the findings, decision and order. The subsequent appeal to the Secretary of State and the ensuing judicial review were, perforce, based upon the record, decision and order thus made by the majority of the Commission, absent the newly discov-

ered evidence as to bias and prejudice and absent any issue with respect thereto.

The above key facts clearly bring the present case out of the scope of *Air Associates*. The Secretary of State, in his order of November 19, 1953, arbitrarily attempted to fit these facts into *Air Associates*. The Commission, in its denial order of September 14, 1953, made no such attempt, nor, in fact, did it give any reason for its action.

The Secretary of State's analysis (JA 8-11) consists of a series of assumptions as to what the Commission did on September 14, 1953, all of which are unsupported in the actual facts and all of which appear to be designed to seek the shelter of *Air Associates*. Thus

1. *"It is apparent that in acting upon the Petition to Reopen this proceeding, the present acting Commissioners have treated the decision of the two former Commissioners as though it were the recommended decision of an agency trial examiner, and have reviewed the entire record."* (JA 10.)

The two former Commissioners were not trial examiners. They were the majority of the agency itself. They sat as hearing and adjudicating officers. They made elaborate findings of fact, rendered a decision, issued a disciplinary order. All subsequent reviews, both administrative and judicial, were under the presumptions governing the findings of administrative tribunals. Appellant's Petition to Reopen Proceeding was not a motion for review by the Commission on the merits. If this were possible, appellant would, in his Petition to the Commission, have attacked the evidence already of "record" and prayed for reversal. He prayed for a hearing as to the bias and prejudice and for a new hearing on the merits if bias and prejudice were proved or conceded. It was not within the province of the Commission on September 14, 1953, to consider its previous action, in the face of the facts, as the action of an agency trial examiner. It was wholly fictitious for the Secretary

of State to assume, on November 19, 1953, that the Commission had taken this suppositious approach.

2. "On that basis, and in the light of the Petitioner's proffered newly-discovered evidence, the new Commissioners have found that even if the Petitioner's allegations of bias and prejudice on the part of the former Commissioners were considered as proved, the facts in the record would lead them to the same conclusion. They have thus based their own decision upon the record itself." (JA 10.)

It is submitted, however, that had the Commission, as a result of appellant's Petition to Reopen, embarked on the extraordinary project of considering the case *de novo* and, acting directly on a mere transcript of testimony, reached the same result as their predecessor Commissioners, it would have said so. Moreover, it would or should have afforded appellant an opportunity to submit proposed findings, etc. Following established and proper practice, the new Commissioners would have issued their own findings of fact, decision and order. They did not do so but in a single sentence completely and precisely adopted all of the findings of their biased predecessors, making the decision of the biased Commissioners in effect their own. This is the precise fact basis upon which Judge Hutcheson, in *N.L.R.B. v. Phelps*, supra, as has been seen, distinguished *Air Associates* and refused to apply it in upsetting a Board order based on the findings of a biased and prejudiced trial examiner. And given such facts, the court in *Air Associates*, as has been seen, would have considered the record as "contaminated" and not "lawfully" to be acted upon.

The Secretary of State was therefore in error in concluding that *Air Associates* was "closely analogous" to the instant case and that, "accordingly", he was required to affirm the Commission.

It remains to consider whether, as the Secretary of State further stated on November 19, 1953, there was a *fortiori* basis for applying *Air Associates* because, "Peti-

tioner on his own motion stands [stood] mute at the hearing." (JA 10).

Appellant stood mute, on advice of his undersigned counsel, because of deprivation of rights. The reason stated constituted a full and firm protest. That there were issues of fact and of law as to whether appellant, as charged, was guilty of violation of any of the Canons of Ethics was clear. Appellant had filed a sworn Answer supported by affidavits of witnesses substantially refuting and denying all charges. The Secretary of State's position now appears to be that appellant, having stood mute in protest, could not thereafter be hurt by anything the biased and prejudiced Commissioners could do in receiving the testimony, making findings of fact, issuing a decision, and promulgating an order providing for the severest punishment within the Commission's discretionary power.

It is indeed surprising to find this position taken by the Secretary of State of the United States. It is an alien concept abhorrent to our traditions. It presupposes (a) that under our system of government a person must submit, at his peril, to administrative tribunals shown to be activated by bias, prejudice and malice; (b) that a hearing can be fair even if the judges are biased, prejudiced and malicious; or (c) that an unfair hearing can be harmless.

Of what material consequence is it, under the circumstances of the case, that appellant stood mute? He did not, by standing mute, plead guilty. He had made his sworn Answer and he conceded nothing. The hearing went on and the Commission received the testimony of witnesses and tried the facts. Findings of fact were made. The biased Commissioners made one set of findings, the unbiased Commissioner made a wholly different set of findings. Appellant was clearly entitled to an impartial determination by the triers of the facts albeit all of the evidence was introduced by the Commission and none by the appellant. In *Whitaker v. McLean*, 73 U.S. App. D.C. 259, 118 F. 2d 596 (1941), this Court reversed because of the remarks of the trial judge evidencing bias and prejudice, *although*



*plaintiff's attorney declined to go on with the case even in the absence of a jury. This Court acted in the interests of a fair trial although it expressed the view that plaintiff's case was probably without merit. We submit that in the instant case, also, appellant did not waive a right to a fair and impartial hearing because he stood mute.*

Even if it be assumed, *arguendo*, that the effect of standing mute, under the circumstances, was to concede all of the allegations in the charges and plead guilty, the Commission exercised discretion as to whether or not to impose a sanction, and whether, in fixing the degree of punishment, to censure, suspend, revoke, or revoke forever, appellant's right to practice before it. The biased majority fixed revocation forever as the penalty. Commissioner Baker, dissenting, found that only reprimand was warranted given a complete absence in the record of dishonesty, violation of law, moral turpitude, previous record of misconduct, personal or professional. Appellant was entitled to have the punishment, if any, fixed by a tribunal not activated by personal bias, prejudice and malice. Thus, in a disciplinary proceeding brought by the Federal Communications Commission against two attorneys, *In re Sigal and Smith* (1937) 5 F.C.C. 3, 51 Harv. L. Rev. 1101, a Commissioner was charged with bias and the Commission said:

"If this case were one in which the facts were not in controversy and in which the Commission was not required to exercise discretion, but only the application of principles of law to an admitted state of facts was involved, the right of the respondents to an impartial and unbiased tribunal might be adequately safeguarded by a statutory right of appeal from the decision of the Commissioners. This case, however, involved facts which were in dispute and the respondents were entitled to an impartial and unbiased trial of those facts. Furthermore, the case involved the exercise of discretion in the possible imposition of a penalty at the conclusion of the proceedings . . . In other words, *even if the facts in this case had been*

*conceded, and if the only question before the Commission had been the degree of punishment, the respondents would have been entitled under our form of government and the law of the land, to have that punishment fixed by a tribunal, none of the members of which was activated by personal prejudice, bias or malice."* (Emphasis supplied.)

4. Assuming, arguendo, that National Labor Relations Board v. Air Associates is "closely analagous" to the instant case, its doctrine as to the effect of bias and prejudice is contra to the great weight of authority and does not reflect the law in this Circuit.

Although, as has been seen, *Air Associates* was rigidly confined to its own facts, and has never been followed, is *Air Associates* sound legal doctrine on its own facts? We submit that *Air Associates* is contra to the great weight of authority and the reverse position has been taken in this Circuit. The issues raised by *Air Associates* are as follows: Can a hearing under the Fifth Amendment, be a fair hearing under any circumstances if the judges are biased and prejudiced? Is a respondent, in addition to a showing of bias and prejudice, required to show some independent ground of hurt in the proceeding itself?

The traditional abhorrence in our jurisprudence against trial by biased judges is cited in *People v. Naimark*, 154 App. Div. 76, 139 N.Y.S. 418, as follows (p. 420):

"... the first idea in the administration of justice... is that a judge must necessarily be free from all bias and prejudice. He cannot be both judge and party, arbiter and advocate in the same cause. Mankind are so agreed in this principle that any departure from it shocks their common sense and sentiment of justice."

The record made before a biased judge is "contaminated" and a decision by such a judge must be set aside. *N.L.R.B. v. Air Associates*, supra.

"... the object of all legislation pertaining to judicial or quasi judicial proceedings is to furnish an impartial



and wholly disinterested tribunal . . . "*Meyers v. Shields*, 61 Fed. 713 at p. 725 (1894).

In *Tumey v. Ohio*, (1926) 273 U.S. 510, the Supreme Court held that a trial by a biased judge is not in conformity with due process and said (p. 535):

"... no matter what the evidence was against him, he had the right to have an impartial judge..."

Also: *Jordan v. Massachusetts*, (1911) 225 U.S. 167, 176. As stated by this Court in *Whitaker v. McLean*, 73 App. D.C. 259, 118 F. 2d 596:

"... a right to be tried by a judge who is reasonably free from bias is a part of the fundamental right to a fair trial."

In the latter case, this Court, as has been seen, reversed for biased and prejudiced remarks of a trial court without a jury, where plaintiff's attorney would not go on because of such bias and prejudice, and even though this Court was of the impression that plaintiff's case was without merit. Cf. *Berger v. United States*, 255 U.S. 22 (1921); *Peckham v. United States*, — U.S. App. D.C. —, 210 F. 2d 693 (1953) where the bias of a trial judge caused this Court to reverse because the judgment could not be sustained "as the product of a fair and impartial trial" (p. 702).

The law is, and cannot be otherwise, as to biased members of administrative tribunals, 42 Am. Jur., Pub. Adm. Law, § 23 and cases cited, or administrative trial examiners. *Air Associates* itself is one of a series of cases involving the claimed bias and prejudice of trial examiners of the National Labor Relations Board which came before the various Federal Circuits in the period following 1939 and give rise to a fresh appraisal of the effect to be given by the courts to the admitted bias and prejudice of administrative trial examiners.

Among the earliest of these cases was *Inland Steel Co. v. N.L.R.B.* (7th Cir. 1940) 109 F. 2d 9 and *Montgomery Ward and Co. v. N.L.R.B.* (8th Cir. 1939), 103 F. 2d 147. In both of these cases it was held that bias by the trial examiner was prejudicial per se, and no actual harm need be shown to upset the proceeding. In *Inland Steel Co.* the Court said (at p. 20):

"The Act [National Labor Relations Act] authorizes the Board to enter a complaint alleging unfair labor practices, only after a 'hearing'. This must mean a trial by a tribunal free from bias and prejudice and imbued with the desire to give the parties equal consideration . . . Foremost among the responsibilities upon a reviewing court, is to make sure that this foundation of our judicial system be not undermined."

Thus, the bias of the trial examiner rendered the Board's order unenforceable in *N.L.R.B. v. Washington Dehydrated Food Co.* (9th Cir. 1941) 118 F. 2d 980 and in *N.L.R.B. v. Phelps* (5th Cir. 1943) 136 F. 2d 962, the latter, as has been seen, distinguishing *Air Associates*. In *Phelps*, the Court, speaking through Judge Hutcheson said (pp. 562-564):

"... Both respondents oppose the petition . . . on the ground that the trial out of which the orders sought to be enforced grew was not a fair trial, resulting in a just adjudication, and, therefor, according them the due process to which they were entitled, but a trial by a biased and partisan examiner who starting out with a fell and partisan purpose to convict, arrived at a predetermined, and, therefore, biased and partial result. Insisting that for this reason the findings and orders may not stand, respondents pray that the petition to enforce the orders be denied and the matter be sent back to the Board for a fair and impartial trial.

"The Board does not, indeed, it could not, contest the correctness of the principle respondents invoke, for a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well as when the judgment is done in an

administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there be any difference, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency, been relaxed.<sup>1</sup> *Nor will the fact that an examination of the record shows there was evidence which would support the judgment, at all save a trial from the charge of unfairness, for when the fault of bias and prejudice in a judge first rears its ugly head, the effect remains throughout the proceeding. Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the proceedings, and no judgment based upon them may stand.*" (Emphasis supplied. An extensive marginal review of authority is set forth at "1" above.)

*Phelps* has been sustained in *Pittsburgh S.S. Co. v. N.L.R.B.* (6th Cir. 1948) 167 F. 2d 126; and *N.L.R.B. v. Bryan Manufacturing Co.* (7th Cir. 1952) 196 F. 2d 477.

Chief Judge Stephens of this Court, dissenting in *Bethlehem Steel Co. v. N.L.R.B.*, 74 U.S. App. D.C. 52, 120 F. 2d 641 (1941), squarely affirmed the doctrine of *Inland Steel Co.*, supra, in contravention of *Air Associates*, by pointing out that there was no cure for bias except rehearing before a fair officer. The majority did not disagree but concluded that the hearing officer had not been biased and prejudiced. Chief Judge Stephens stated (p. 659):

"Once bias exists in a judicial officer, hearings before him are vitiated . . ."

And in answer to the contention that in addition to bias some independent prejudice must be shown, Chief Judge Stephens said (p. 658):

"The bias is itself prejudice because the due process clause of the Fifth Amendment to the Constitution

guarantees a fair hearing and there can be no fair hearing before a biased officer. *The law does not speculate as to the consequences of bias once it is shown. . .*" (Emphasis supplied.)

Adverting to the opposing positions thus taken by Chief Judge Stephens and by Judge Frank in *Air Associates*, a commentator described the *Air Associates* doctrine as being that the bias of an examiner is harmless if other error is not shown, and said (Scott, R.D., *Bias of Trial Examiners and Due Process of Law*, 30. Geo. L. J. 56-62, Nov. 1941, at p. 60):

"If bias means anything, it means partiality on the part of the examiner. If it is possible to show this partiality to exist independently of other procedural error, it is either reversible error or it is not. If it is reversible error, Chief Justice Stephens' view is the only logical one; there can be no fair hearing before a biased judge . . . But if it is impossible to show the existence of bias independently, then we may as well be done with the concept, for if bias can be proved only by showing the commission of some prejudiced error, there is no need to prove bias . . ."

See, also, Godman, J. M., *Disqualification for Bias of Judicial and Administrative Officers*, 23 N. Y. U. Quarterly Rev. 109-41, January, 1948; Davis, K. C., *Bias of Administrative Officers*, 32 Minn. L. Rev. 199-218, Feb., 1948; Sedgewick, R. M., *Disqualification on the Ground of Bias as Applied to Administrative Tribunals*, 23 Canadian Bar Review, 453, June-July, 1945.

It would thus appear that, assuming *Air Associates* to be analogous on its facts to the instant case (which, as has been seen, it is not), *Air Associates* itself, insofar as it appears to say that bias in a hearing officer is harmless unless error is shown, has not been followed, is contra to the great weight of authority, and is inconsistent with decisions in this Circuit.

### CONCLUSION

Appellant, an attorney, was charged, found guilty and severely punished for alleged professional misconduct by quasi-judicial officials activated by personal bias, prejudice and malice. Successor officials and the Secretary of State, on review, on the basis of formally submitted newly discovered and proffered evidence conceded the bias, prejudice and malice but refused, nevertheless, to reopen the proceeding. This Court is not faced with the problem in *Bethlehem Steel Co. v. N.L.R.B.*, supra, of first determining, as it did then, whether the evidence was sufficient to establish bias. It is here faced only with the question, as was Chief Judge Stephens dissenting in *Bethlehem*, of the effect of bias where shown or conceded. A hearing by biased, prejudiced and malicious hearing officers is not the fair hearing guaranteed by the Fifth Amendment to the Constitution. It is not a hearing at all. The refusal of the Secretary of State, in his order of November 19, 1953, to face up to the consequences of contaminated administrative action is the very essence of what is arbitrary, capricious and abuse of discretion in administrative officials. It is the traditional role of the judiciary to protect the individual from this kind of governmental abuse. This Court should, and will, assure the integrity of the administrative process as it impinges on the professional life and reputation of an attorney.

It is submitted that the judgment of the District Court should be reversed.

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# APPENDIX



IN THE  
**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 12,279

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SAMUEL HERMAN, *Appellant*

v.

WHITNEY GILLILLAND, PEARL CARTER PACE and  
HENRY J. CLAY, as members of the Foreign Claims  
Settlement Commission of the United States,  
*Appellees*

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Appeal from the United States District Court  
for the District of Columbia

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**JOINT APPENDIX**

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1 IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLUMBIA

Civil Action No. 5510-'53

SAMUEL HERMAN,  
1341 G Street, N. W.,  
Washington, D. C., *Plaintiff*,

v.

JOHN FOSTER DULLES, as  
Secretary of State of the  
United States, *Defendant*.

Filed Nov. 30, 1953

**Complaint for Judicial Review of Orders of the International  
Claims Commission of the United States and of the Sec-  
retary of State: Temporary Restraining Order: Injunction:  
Declaratory Judgment: and Other Relief**

1. This is a civil action under Sections 9 and 10 of the Administrative Procedure Act, Act of June 11, 1946, c. 324, §§ 9 and 10, 60 Stat. 238, 5 U.S.C.A. §§ 1008 and 1009, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars. This Court has jurisdiction by virtue of 28 U.S.C. § 1331 and Section 10 of the Administrative Procedure Act.

2. Plaintiff is a resident of the District of Columbia, is a citizen of the United States and is a member in good standing of the bars of the District of Columbia and of the States of Indiana and Illinois.

3. The defendant is Secretary of State of the United States and is head of the Department of State, of which the International Claims Commission of the United States (hereinafter referred to as the "Commission"), created by the International Claims Settlement Act of 1949, 22 U.S.C.A. Sec. 1621, *et seq.*, is a constituent part. The defendant is found in the District of Columbia.

4. On July 3, 1952, the Acting Secretary of State rendered an agency decision affirming an order of the Commission dated February 18, 1952 which purported to revoke forever the right of plaintiff to represent claimants before the Commission because of alleged violation of certain of the Canons of Ethics of the American Bar Association. The said order of the Commission was rendered by a majority of the Commission (Chairman Marvel and

Commissioner McKeough) after a hearing at which  
2 all three Commissioners presided in person. An opinion was issued by the majority containing elaborate findings of fact, a decision and an order. The minority of the Commission (Commissioner Baker) dissented from the findings of fact, decision and order, making other findings and recommending censure as punishment. At the hearing, plaintiff, on advice of counsel, refused to acquiesce to the bias and prejudice of the majority of the Commission and stood mute, protesting denial of rights, and asserting that the majority of the Commission was disqualified. A copy of counsel's statement announcing the decision to stand mute is attached hereto as "Appendix 'D'" and made part hereof. Among other motions denied theretofore by the Commission was a motion by plaintiff to refer the matter to the Committee on Admissions and Grievances of this Court for any appropriate action.

5. On August 8, 1952, the Acting Secretary of State postponed the effective date of the agency decision of July 3, 1952 pending conclusion of judicial proceedings. Plaintiff sought judicial review in this Court. On November 17, 1952, this Court granted summary judgment for defendant, the Secretary of State. The Court of Appeals for the District of Columbia Circuit affirmed on June 4, 1953. The key issue before both courts was the applicability of the Administrative Procedure Act of 1946 to disciplinary proceedings against attorneys.

6. Effective June 30, 1953, the President terminated the terms of office of the aforesaid majority of the Commis-



sion (Chairman Marvel and Commissioner McKeough) on grounds, *inter alia*, of failure of performance. Thereafter, on August 3, 1953, plaintiff lodged with the Commission, under its rules, a Petition to Reopen Proceeding, with appended affidavits and exhibits, on the ground that newly discovered evidence had been obtained establishing the bias, prejudice and prejudgment of Chairman Marvel and Commissioner McKeough in the disciplinary proceeding against plaintiff. A copy of the said Petition to Reopen Proceeding is attached hereto as "Appendix 'A'" and made part hereof. Plaintiff prayed that the Commission's disciplinary order of February 18, 1952 be set aside pending (1) a hearing on the issue of bias and prejudice, and (2) a new hearing on the merits of plaintiff's case. The Circuit Court of Appeals for the District of Columbia Circuit being apprised of said Petition stayed its mandate until October 12, 1953 pending consideration thereof by the Commission.

3        7. On September 14, 1953, two successor acting Commissioners having in the interim been appointed by the President, the said acting Commissioners, without affording plaintiff a hearing as requested, denied the Petition to Reopen Proceeding in a single sentence on the following ground and no other: "... that the new evidence as proposed to be offered, and if of full evidential purport as represented, would in no way contradict, dispute or impair the weight of evidence already of record ample to support and sustain the aforementioned decision and order." The Commission neither made nor promulgated independent findings of fact, decision, or order, as to the "evidence already of record", merely adopting the prior decision and order of their predecessors, Chairman Marvel and Commissioner McKeough. A copy of the said Commission denial order of September 14, 1953, is attached hereto as "Appendix 'B', Exhibit 'A'" and made part hereof.

8. On October 26, 1953, plaintiff filed with the Secretary of State a Petition for Review of the said denial order of the Commission of September 14, 1953. A copy of said

Petition for Review is attached hereto as "Appendix 'B' " and made part hereof. Plaintiff prayed that the defendant issue an order directing the Commission (1) to afford plaintiff a hearing on the question of whether plaintiff had received a fair hearing and to grant plaintiff a fair hearing on the issues if the Commission found plaintiff had not received a fair hearing because of bias and prejudice, or (2) in the alternative, directing the Commission to grant plaintiff a new hearing on the merits.

9. On November 19, 1953, the defendant, without affording plaintiff a hearing, rendered an agency decision affirming the Commission's denial order of September 14, 1953. The defendant, in the said decision, decided that the Commission had held that even if the bias and prejudice of the former Commissioners were considered proved, the new Commissioners acting on the record itself were led to the same conclusions as their predecessors. Stating that *National Labor Relations Board v. Air Associates*, 2 Cir. 1941, 121 F(2) 586 was "closely analogous", the defendant affirmed on the authority of that case. In response to plaintiff's prayer for stay pending completion of judicial review, defendant ordered the effective date of his order of July 3, 1952 stayed for fifteen days, or until December 4, 1953. A copy of the defendant's order of November 19, 1953, is attached hereto as "Appendix 'C' " and made part hereof.

4            10. The said decision of the Secretary of State of November 19, 1953 constitutes final agency action within the meaning of Section 10 (c) of the Administrative Procedure Act in violation of Section 9 of said Act for which plaintiff has no other adequate remedy in any court. Plaintiff is aggrieved in that:

(a) He has been denied due process of law under the Fifth Amendment to the Constitution of the United States, since a hearing conducted, findings made, and sanction invoked by biased and prejudiced Commissioners is a deprivation of plaintiff's right to a hearing;

(b) He has been deprived of a valuable property right without due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States;

(c) He has been deprived of a hearing on the charges against him as required by applicable statutes and regulations, since an unfair hearing by biased and prejudiced Commissioners is no hearing;

(d) The denial order of the Commission of September 14, 1953 has been affirmed by the defendant on improper and illegal grounds; to wit,

- (1) The defendant's interpretation of the Commission's actions in entertaining plaintiff's Petition to Reopen Proceeding and ruling thereon is unwarranted and is not substantiated by the actual facts;
- (2) The defendant was in error in holding that *National Labor Relations Board v. Air Associates, supra*, was "closely analogous" to the present case and in affirming the Commission's denial order on the strength of that case;
- (3) *National Labor Relations Board v. Air Associates, supra*, is, in any event, a minority view and is opposed by the weight of authority in the Federal Circuits and in the District of Columbia Circuit on the issue of whether bias by an administrative tribunal or hearing officer is prejudicial per se demanding reversal.

11. The defendant, by affirming the order of the Commission of September 14, 1953 has subjected plaintiff to great and irreparable injury to his professional reputation; and irreparable injury will be further suffered by divers other persons whom plaintiff actively represents, or with whom he is professionally associated in pending matters before the Commission, unless this Court grants the relief hereinafter prayed.

WHEREFORE, plaintiff prays:

1. That a temporary restraining order be granted forthwith:

- (a) restraining and enjoining the defendant from putting into effect his order of July 3, 1952;
- (b) directing the defendant to vacate his order of November 19, 1953 and the Commission's order of September 14, 1953;
- (c) restraining and enjoining the defendant from attempting to subject plaintiff to the sanction imposed by the Commission or any other sanction not authorized by law.

2. That this Court issue its order directed to the defendant to show cause, if any he has, at a convenient day to be fixed by this Court, why a preliminary injunction should not be granted restraining, enjoining and directing the defendant during the pendency of this action pursuant to the prayers of this complaint and particularly paragraph 3 thereof.

3. That this Court grant and issue a preliminary injunction pending final determination of this action restraining and enjoining the defendant from putting into effect his decision of July 3, 1952, directing him to vacate said decision and order and enjoining him from subjecting or attempting to subject plaintiff to the sanction imposed by the Commission, or any other sanction.

4. That upon final hearing of this action this Court grant, decree and issue a permanent injunction restraining and enjoining the defendant from putting into effect his decision of July 3, 1952 affirming the order of the Commission of February 18, 1952, revoking forever the right of plaintiff to represent claimants before the Commission; directing him to vacate said order; and restraining the defendant from further subjecting or attempting to subject plaintiff to

the sanction imposed by the Commission herein or any other sanction.

6        5. That upon final hearing this Court declare, adjudge and decree that the sanction to which defendant and the Commission propose to subject plaintiff is invalid and not authorized by law.

6. That the plaintiff may have such other and further relief in the premises as this Court shall deem just and proper.

KENNETH N. PARKINSON  
Kenneth N. Parkinson  
Shoreham Building  
Washington, D. C.

JOSEPH L. NELLIS  
Joseph L. Nellis  
Colorado Building  
Washington, D. C.  
*Attorneys for Plaintiff.*

\* \* \* \* \*

#### **Appendix "C" to Complaint**

In the Matter of

SAMUEL HERMAN and the  
INTERNATIONAL CLAIMS COMMISSION OF THE  
UNITED STATES

#### **DECISION**

This case is before the Secretary of State on a Petition filed by the Petitioner, Samuel Herman, for review of an Order of the International Claims Commission of the United States, dated September 14, 1953.

On February 18, 1952, the International Claims Commission (Chairman Marvel and Commissioner McKeough) is-



sued a decision finding that the Petitioner had violated certain canons of the Code of Ethics of the American Bar Association, and ordered that his right to appear before the Commission in any claim proceeding be forever revoked. On July 3, 1952, the Acting Secretary of State affirmed the Commission's Order. The Petitioner sought judicial review in the United States District Court for the District of Columbia. On November 17, 1952, the Court granted summary judgment for the defendant, the Secretary of State. The Court of Appeals for the District of Columbia Circuit affirmed on June 4, 1953.

On August 3, 1953, the Petitioner filed a Petition to Re-open Proceeding with the then newly-constituted International Claims Commission, on the ground that newly-discovered evidence not before available to Petitioner showed such bias and prejudice in a majority of the original Commissioners as to require that their decision and order be set aside pending (1) a hearing on the issue of bias and prejudice and (2) a new hearing on the merits of the Petitioner's case.

On September 14, 1953, the Acting Commissioners denied the petition on the ground "that the new evidence described in the petition as proposed to be offered, if admitted, and if of full evidential purport as represented, would in no way contradict, dispute, or impair the weight of evidence already of record ample to support and sustain the aforementioned decision and order."

The Petitioner prays that an order be issued by the Secretary of State:

(1) Directing the Commission to afford respondent a hearing before the Commission on the question of whether he had received a fair hearing and to grant respondent a new hearing on the issues if it is found that respondent had not received a fair hearing; or, in the alternative

(2) Directing the Commission to grant respondent a new hearing on the merits;



(3) Continuing the Secretary of State's stay order of August 8, 1952 pending action on this Petition for Review of the Commission's Order of September 14, 1953, and if necessary, pending the completion of judicial review thereof;

(4) Granting such other, further and different relief as may be proper.

The Petitioner also requests a hearing on this Petition.

It is apparent that in acting upon the Petition to Reopen this proceeding, the present Acting Commissioners have treated the decision of the two former Commissioners as though it were the recommended decision of an agency trial examiner, and have reviewed the entire record. On that basis, and in the light of the Petitioner's proffered newly-discovered evidence, the new Commissioners have found that even if the Petitioner's allegations of bias and prejudice on the part of the former Commissioners were considered as proved, the facts in the record would lead them to the same conclusion. They have thus based their own decision upon the record itself. This case appears to be closely analogous to *National Labor Relations Board v. Air Associates*, 2 Cir., 1941, 121 F. 2d 586, where it was held that "... absent a showing of harmful error in the admission or exclusion of evidence or of intimidation of witnesses, or the like, no court would order a retaking of the testimony heard before such a master solely because he was biased, for, in such circumstances, his bias could have no practical hurtful consequences on the ultimate outcome of the trial." *A fortiori*, where the Petitioner on his own motion stands mute at the hearing.

Accordingly, the denial by the International Claims Commission of the petition to reopen the proceeding is affirmed and the Petitioner's request for a hearing on the petition for review by the Secretary of State is denied.

IT IS HEREBY ORDERED, that the effective date of the agency decision of July 3, 1952 be, and it hereby is, stayed

for not more than fifteen days from the date of this decision.

/s/ JOHN FOSTER DULLES  
*Secretary of State*

November 19, 1953

\* \* \* \* \*

8

Filed Dec. 21, 1953

**Order Granting Preliminary Injunction**

This cause coming on to be heard on the motion of plaintiff for a preliminary injunction; and the Court having considered the arguments of counsel and being fully advised in the premises, it finds that plaintiff will suffer irreparable injury as a result of defendant's order of November 19, 1953, pursuant to which defendant's order of July 3, 1952, will go into effect revoking forever plaintiff's right to represent claimants before the International Claims Commission of the United States, an agency in the Department of State.

It is ordered, adjudged and decreed that pending further order of this Court, the defendant be, and hereby is, restrained and enjoined from putting into effect his order of July 3, 1952 whereby defendant rendered the agency decision affirming an order of the aforesaid Commission dated February 18, 1952, purporting to revoke forever plaintiff's right to appear in representation of claimants before the said Commission.

It is further ordered, adjudged and decreed that no bond shall be required of plaintiff in this connection.

Enter:

R. B. KEECH

*United States District Judge*

Dated: 12/21/53

\* \* \* \* \*

Filed Jan. 29, 1954

**Answer****FIRST DEFENSE**

The Complaint fails to state a cause of action upon which relief may be granted.

**SECOND DEFENSE**

Answering specifically the numbered paragraphs of the complaint, defendant avers:

1. Defendant is not required to answer the allegations contained in paragraph 1 of the complaint.

2. Defendant is without information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the complaint.

3. Admitted.

4. The allegations contained in paragraph 4 of the complaint are admitted, except it is denied that the majority of the Commission was biased and prejudiced and it is further denied that the rights of the plaintiff were denied. Defendant alleges that when the order of the Commission was reviewed by the then Secretary of State the matter was referred to a Committee of the Bar Association of the District of Columbia for its recommendation.

5. The allegations contained in paragraph 5 are admitted, except that the defendant avers that he is not required to answer the allegation contained in the final sentence of paragraph 5.

10      6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted.

10. The defendant is not required to answer the allegations contained in paragraph 10 inasmuch as they constitute conclusions of law. To the extent that they may be allegations of fact, the allegations contained in paragraph 10 are denied.

11. Denied.

### THIRD DEFENSE

Inasmuch as the complaint seeks to review and enjoin the original order of the defendant's predecessor, such review is precluded by the doctrine of res judicata.

### FOURTH DEFENSE

Plaintiff's application to the International Claims Commission to reopen the administrative hearings was addressed to the discretion of the Commission. In refusing to grant plaintiff's application, neither the International Claims Commission nor the defendant abused their discretion.

WHEREFORE having fully answered, the defendant demands judgment together with the costs of this action.

LEO A. ROVER

Leo A. Rover

*United States Attorney*

OLIVER GASCH

Oliver A. Gasch

*Assistant United States Attorney*

FRANK H. STRICKLER

Frank H. Strickler

*Assistant United States Attorney*

ROBERT L. TOOMEY

Robert L. Toomey

*Assistant United States Attorney*

\* \* \* \* \*

12

Filed May 3, 1954

**Defendant's Motion for Summary Judgment**

Comes now the defendant and by his attorney, the United States Attorney, moves this honorable Court for summary judgment in his favor on the ground that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law.

LEO A. ROVER

Leo A. Rover

*United States Attorney*

OLIVER GASCH

Oliver A. Gasch

*Assistant United States Attorney*

FRANK H. STRICKLER

Frank H. Strickler

*Assistant United States Attorney*

ROBERT L. TOOMEY

Robert L. Toomey

*Assistant United States Attorney*

\* \* \* \* \*

13

Filed May 11, 1954

**Plaintiff's Cross-Motion for Summary Judgment**

Pursuant to Rule 56 (c) of the Rules of Civil Procedure for the United States District Courts, as amended, plaintiff opposes defendant's motion for summary judgment and moves the Court for a summary judgment upon the complaint filed in this Court on November 30, 1953.

In support of this motion, plaintiff states to the Court that there is no genuine issue as to any material fact in this case and that plaintiff is entitled to judgment, as hereafter prayed, as a matter of law.

WHEREFORE, plaintiff prays:

1. That this Court grant, decree and issue a permanent injunction, making perpetual and permanent the prelimi-

nary injunction heretofore granted and issued by this Court herein on the 21st day of December, 1953, restraining and enjoining the defendant, and his successor or successors herein, if any, from putting into effect defendant's order of July 3, 1952, whereby defendant rendered the agency decision affirming an order of the International Claims Commission of the United States, an agency in the Department of State, dated February 17, 1952, forever barring plaintiff from appearing in representation of claimants before the said Commission; directing him to vacate such orders of July 3, 1952 and February 17, 1952; and restraining and enjoining the defendant, and his successor or successors herein, if any, from attempting to subject plaintiff to the sanction imposed by the said Commission herein, or to any other sanction not authorized by law.

14        2. That this Court declare, adjudge and decree that the sanction to which defendant has attempted to subject the plaintiff is invalid.

3. That the plaintiff have such other and further relief in the premises as this Court shall deem just and proper.

KENNETH N. PARKINSON  
Kenneth N. Parkinson,  
Shoreham Building,  
Washington, D. C.

JOSEPH L. NELLIS,  
Joseph L. Nellis,  
Colorado Building,  
Washington, D. C.,  
*Attorneys for Plaintiff.*

\*   \*   \*   \*   \*   \*   \*   \*

15

Filed June 17, 1954

### Order

This cause came on for hearing on the cross-motions of the parties for summary judgment. Upon consideration of said motions and oral argument of counsel, it appears to



the Court that there is no genuine issue of material fact and that defendant is entitled to judgment as a matter of law. It is, therefore, by the Court this 17th day of June, 1954,

ORDERED that the defendant's motion for summary judgment be granted and that the plaintiff's cross-motion for summary judgment be denied, and it is

FURTHER ORDERED that judgment be and the same is hereby entered for the defendant.

EDWARD A. TAMM  
*Judge*

\* \* \* \* \*

16

Filed June 17, 1954

**Motion for Restoration of Injunction Pending Appeal**

Comes now the plaintiff, by his undersigned attorneys, and moves this Court for an order pursuant to Rule 62(c) of the Federal Rules of Civil Procedure restoring the injunction heretofore granted plaintiff in this cause by Judge Richmond Keech of this Court on December 21, 1953, during the pendency of an appeal to the United States Court of Appeals for the District of Columbia from the judgment entered in this cause on the      day of June, 1954, granting defendant's motion for summary judgment and denying plaintiff's cross-motion for summary judgment.

In support of this motion, plaintiff states to the Court that this motion is properly addressed to this Court under the aforesaid Rule 62(c); that the requisites for the granting of this motion are here present; and that the balancing of equities demonstrate that this motion should be granted.

**THIS MOTION IS PROPERLY ADDRESSED TO THIS COURT**

Plaintiff proposes to file notice of appeal from the final judgment heretofore entered by this Court in this cause to the United States Court of Appeals for the District of Columbia and to perfect such appeal pursuant to the ap-

plicable Federal Rules of Civil Procedure. The issues in this cause were first considered by Judge David Pine of this Court on November 30, 1953, who, after consideration of the arguments of both parties, stated he was prepared to sign a restraining order unless it was orally stipulated that defendant "stay his hand" pending hearing on a preliminary injunction. Thereafter, on December 21,

17 1953, briefs having been filed and oral argument held, Judge Richmond Keech of this Court granted a preliminary injunction, a copy of which is attached hereto as Exhibit "A" and made part hereof. Judge Keech found that plaintiff would suffer irreparable injury as a result of defendant's order of November 19, 1953, and granted the prayer for preliminary injunctive relief. Judge Keech considered the very points made by defendant in support of his motion for summary judgment and rejected them in favor of the clear and unequivocal reasons asserted by plaintiff in support of his cross-motion for summary judgment.

The defendant, the Secretary of State, postponed the effective date of his here challenged order of November 19, 1953, to permit judicial review because of the importance of the questions involved and the irreparable injury to be suffered by plaintiff should defendant's order go into effect.

Thus three judges in this Court have considered the issues—*res judicata* and the effect of bias—in this cause; two have ruled in favor of plaintiff, one in favor of defendant. A preliminary injunction, by Judge Keech, has maintained the status quo from December 21, 1953 to date. Prior thereto, restraints upon the challenged order of November 19, 1953, were made effective by the defendant and Judge Pine of this Court. No opinion was promulgated by this Court in rendering summary judgment for defendant. By asking this Court to continue to maintain the status quo, plaintiff merely asks this Court to continue what two judges, fully advised, have already done. The jurisdiction of this Court to restore and thereby continue the pre-ex

isting injunction during the pendency of an appeal is clearly established by Rule 62(c) of the Federal Rules of Civil Procedure.

THE NECESSARY PREREQUISITES FOR RESTORING THE INJUNCTION PENDING APPEAL ARE HERE PRESENT

A motion for restoring an injunction pending appeal is addressed, like a motion for stay pending appeal, to the sound discretion of the Equity Court. *Champlain Refining Company v. Corporation Commission*, 286 U.S. 210; *Flint River Pecan Company v. Fry*, 29 F (2) 457. In a determination as to whether to maintain the status quo until a final determination on appeal, the Court must consider the importance of the questions involved, the doubt with which  
18 they are balanced and the balance of equities between the parties. *Flint River Pecan Co. v. Fry*, supra; *Cotting v. Kansas City Stock Yards*, 82 F. 850; *Louisville and R. R. Company v. United States*, 227 F. 273. Reference to these criteria demonstrates conclusively that the Court in the exercise of its discretion should grant the instant motion. A basic and fundamental Federal and constitutional question rests at the heart of this case: where bias exists, having been conceded, in judicial officers, is a hearing conducted by such officers vitiated because the due process clause of the Fifth Amendment guarantees a fair hearing and there can be no fair hearing before biased officers? This Court, by its judgment, has apparently expressed a view in the negative. Can this conclusion be free from doubt, there having been no opinion rendered in support of this Court's judgment, in the face of the array of authority to the contrary cited by plaintiff, including explicit decisions directly in point by the United States Court of Appeals for this and many other circuits? Can this conclusion be free from doubt in the face of contrary views taken by Judge Pine and Judge Keech of this Court in this very cause?

Can the technical defense of *res judicata* advanced by the Government in this cause clearly lie, beyond peradventure of doubt, in the face of the conclusions by Judge Keech that a biased, like a fraudulent, proceeding cannot be *res judicata* of a subsequent proceeding; and by Judge Pine that the elements of *res judicata* do not exist in this cause?

The defendant in his challenged order of November 19, 1953 found no elements of *res judicata* in *Herman v. Acheson*, 108 F. Sup. 723, *affirmed*, *Herman v. Dulles*, 205 F. 2d 715. A reading of the opinions in each of these cases shows that they are utterly devoid of any reference to the issue of the effect of bias and prejudice. This question was never put in issue or directly or indirectly determined in those cases. This issue as to bias and prejudice, being based on newly discovered evidence introduced in a new and independent administrative proceeding, commenced *after* the above judicial decisions, could not have been raised in the initial proceeding.

Plaintiff does not ask this Court to take an inconsistent position in holding that the issues are in such doubt  
 19 that the instant motion should be granted. If this were so, a court could never exercise its discretion under Rule 62. The granting of this motion would, in fact, be consistent with the actions of two other judges of this Court in this cause.

#### A BALANCING OF EQUITIES DEMONSTRATES THAT THIS MOTION SHOULD BE GRANTED

The granting of the instant motion cannot work to the detriment of the defendant herein. The defendant, well aware of the doubt concerning the validity of his order of November 19, 1953 stayed, in the interests of equity and justice, the effective date of that order pending judicial review. Plaintiff has never ceased to practice before the International Claims Commission. The now admitted bias and prejudice against plaintiff on the part of the judicial officers who sought to impose a harsh sanction against him, has raised a

new and serious question. Judge Keech of this Court found expressly that irreparable injury would be caused to plaintiff's professional standing should defendant's orders of November 19, 1953 and July 3, 1952 become effective. Plaintiff's clients whom he has represented for over three years before the Commission, are in the midst of pending claims proceedings which have not been concluded. Many of such clients are located at a great distance from Washington, D. C. Matters in which plaintiff appears are scheduled for hearings and for oral and written argument currently and in the immediate future.

A balancing of the equities shows that the interests of the parties will not best be served by immediate and summary enforcement of the order excluding plaintiff from further proceedings before the Commission; and that plaintiff and his clients will be gravely and irreparably injured by such enforcement.

It is respectfully submitted that the instant motion should be granted.

KENNETH N. PARKINSON

Kenneth N. Parkinson  
Shoreham Building,  
Washington, D. C.

JOSEPH L. NELLIS,  
Joseph L. Nellis  
Colorado Building,  
Washington, D. C.

\* \* \* \* \*

23

Filed June 18, 1954

#### **Notice of Appeal**

Notice is hereby given this 18th day of June, 1954, that Samuel Herman, plaintiff above named, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the judgment of this Court entered



on the 17th day of June, 1954, in favor of defendant above named and against said plaintiff.

Signed: KENNETH N. PARKINSON  
Kenneth N. Parkinson

Shoreham Building  
Washington, D. C.  
*Attorney for Appellant.*

\* \* \* \* \*

28

Filed July 23, 1954

### Order

This cause came on for hearing on June 17, 1954, upon plaintiff's motion for an order restoring, pending appeal, the preliminary injunction heretofore entered herein. Upon consideration thereof and oral argument of counsel, it appears to the Court that such an order should not be granted. It is therefore by the Court this 23rd day of July, 1954,

ORDERED, That the motion be and the same hereby is denied.

EDWARD A. TAMM  
*Judge*



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# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 12,279

SAMUEL HERMAN, APPELLANT

v.

WHITNEY GILLILLAND, ET AL., MEMBERS OF THE FOREIGN  
CLAIMS SETTLEMENT COMMISSION, APPELLEES

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF COLUMBIA

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BRIEF FOR APPELLEES

---

LEO A. ROVER,

*United States Attorney.*

LEWIS CARROLL,

ROBERT L. TOOMEY,

*Assistant United States Attorneys.*

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*United States Court of Appeals  
For the  
District of Columbia Circuit*

FILED      1954

*Joseph W. Stewart*  
CLERK



QUESTIONS PRESENTED

1. Whether the effect of bias and prejudice upon a disciplinary order is not *res judicata* where appellant in a prior action to review the disciplinary order alleged in his complaint that the hearing officers were actuated by malice, hostility, bias, and prejudice.

2. Whether the Secretary of State abused his discretion in refusing to reopen administrative proceedings upon the theory that alleged bias and prejudice on the part of the hearing officers did not, in the circumstances of the case, vitiate the administrative order.



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# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 12,279

SAMUEL HERMAN, APPELLANT

v.

WHITNEY GILLILLAND, ET AL., MEMBERS OF THE FOREIGN  
CLAIMS SETTLEMENT COMMISSION, APPELLEES

---

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF COLUMBIA*

---

BRIEF FOR APPELLEES

---

## COUNTERSTATEMENT OF THE CASE

Appellant filed a complaint in the District Court originally against the Secretary of State, for judicial review of an order of the International Claims Commission (hereinafter referred to as the "Commission"), affirmed by the Secretary of State, denying appellant's petition to reopen the administrative proceedings which had theretofore culminated in the revocation of his authority to practice as an attorney before the Commission. Upon cross-motions for summary judgment, the District Court entered judgment for the Secretary. (J. A. 15). This appeal followed. The present appellees have been substituted for the Secretary

of State pursuant to Section 9 of the Reorganization Act of 1949.<sup>1</sup>

Before embarking upon a recitation of the material facts of the case, it should be noted that the administrative proceedings concerned with appellant's status as a practitioner before the Commission are now before this Court for the second time. In 1952 appellant sought judicial review of the disciplinary order. The validity of the order was upheld both by the District Court and this Court.<sup>2</sup> Appellees respectfully request the Court to take judicial notice of the record on appeal in that litigation.<sup>3</sup>

Appellant was an attorney and practitioner before the Commission. Following an investigation, the Commission served upon appellant a complaint, charging him with violation of certain of the canons of ethics of the American Bar Association. (Old J. A. 86-90.) The gravamen of the charge was that he had violated the canons of ethics by advertising, soliciting business, and stirring up litigation, based upon the knowledge of claimants acquired in his official capacity while employed in the Office of the Legal Advisor of the Secretary of State, and with whom he had had no previous relations.

The case came on for hearing before the Commission. At the hearing, appellant elected to stand mute (Old J. A. 44). His decision to stand mute was, in his own words, a refusal "to acquiesce to the bias and prejudice of the majority of the Commission." (J. A. 3). The hearing consumed two days during which appellant refused to cross-

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<sup>1</sup> 63 Stat. 206; Title 5 U.S.C. § 133z-7. The Commission was abolished on July 1, 1954 and its functions, as well as the functions of the Secretary of State with respect to it, were transferred to the Foreign Claims Settlement Commission by Reorganization Plan No. 1 of 1954.

<sup>2</sup> *Herman v. Acheson*, 108 F. Supp. 723, *affirmed*, *Herman v. Dulles*, 92 U.S. App. D.C. 303, 205 F.2d 715 (1953).

<sup>3</sup> Reference to the record in the earlier litigation will be made in this brief by citation of the joint appendix designation therein. When the reference is to the joint appendix in that case it will be preceded by the word "old", e.g., (Old J.A. —).

examine witnesses or to participate in any aspect of the hearing (Old J. A. 44).

Pursuant to 22 C. F. R. 300.24,<sup>4</sup> the Commission, on February 18, 1952, issued unanimous findings that appellant had violated Canons 16, 27 and 28 of the canons of ethics of the American Bar Association and ordered his license to practice before the Commission revoked (Old J. A. 66-73).

Appellant thereafter appealed to the Secretary of State, who, in turn, referred the record to a committee of the District of Columbia Bar Association. After review of the record, this committee was "of the unanimous opinion that the respondent appears to have failed to conform to the standards of professional ethics as set forth in the canons of ethics of the American Bar Association." (Old J. A. 9). After a further review of the record, the Secretary affirmed the order of the Commission on July 3, 1952 (J. A. 3). The original civil action followed.

Following the filing of the original complaint, the Secretary of State moved the Court for summary judgment. Appellant filed a cross-motion for summary judgment. The District Court entered judgment for the Secretary. *Herman v. Acheson, supra*. This Court affirmed, ruling that the evidence was sufficient for the Commission's determination. *Herman v. Dulles, supra*.

Subsequent to the decision of this Court, appellant filed with the Commission a petition to reopen the administrative proceedings, alleging as a basis therefor the discovery of new evidence of bias and prejudice on the part of the Commissioners who presided at the disciplinary proceeding (J. A. 4). The petition was denied by the Commission and its order was affirmed by the Secretary of State on November 19, 1953 (J. A. 8-11). The present suit was thereupon filed. The District Court entered a judgment in favor of appellees and this appeal followed.

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<sup>4</sup> " \* \* \* If at any hearing upon issues of fact raised by the papers in the case the respondent fails to put in any evidence, the Commission may base its findings upon the evidence submitted by the attorney for the Commission."

## SUMMARY OF ARGUMENT

It is elementary that motions to reopen administrative hearings are addressed to the sound discretion of the agency and are not to be disturbed except upon a clear showing of abuse of discretion. *United States v. Pierce Auto Lines*, 327 U. S. 515 (1946); *Interstate Commerce Commission v. Jersey City*, 322 U. S. 503 (1944). The Commission and the Secretary of State declined to reopen the administrative hearings upon the theory that the alleged bias and prejudice of the Commission, if proved, could in no way alter the legal conclusions to be drawn from the uncontradicted evidence of record and, therefore, did not, in the circumstances of this case, vitiate the administrative order. The complaint in this action proceeded upon the theory that this reasoning is so clearly erroneous that the Secretary's refusal to reopen the proceedings on that basis amounted to an abuse of discretion. The sole legal problem raised by the complaint was, therefore, the effect of alleged bias and prejudice upon the disciplinary order.

However, the effect of bias and prejudice was necessarily involved in the earlier litigation in which the disciplinary order was upheld and, therefore, the question is foreclosed by the doctrine of *res judicata*. As an alternative position, the appellees assert that, in the circumstances of this case, alleged bias and prejudice could have no practical harmful consequences and that the Secretary of State therefore properly denied appellant's petition to reopen.

## ARGUMENT

## I

**The Issue of the Effect of Bias and Prejudice upon Appellant's Disciplinary Proceeding Is Res Judicata**

The elements of the doctrine of *res judicata* are too well known and understood to require elaborate discussion. A judgment is *res judicata* not only as to all matters directly put in issue and determined by the court in the original litigation, and as to all matters necessarily involved in that judgment, but also as to all matters which were material

to that determination but which were not raised. *Cromwell v. County of Sac*, 94 U. S. 351 (1877); *Chicot County Drainage District v. Baxter Bank*, 308 U. S. 371 (1940); *Angel v. Bullington*, 330 U. S. 183 (1947); *Calvin v. Calvin*, — U. S. App. D. C. —, 214 F. 2d 226 (1954). In a second suit between the same parties upon the same cause of action none of these matters may be raised. Even where the suit is upon a different cause of action, matters put in issue and necessarily involved in the prior decision may not be relitigated, regardless of the fact that they were not specifically disposed of by the court. *Calvin v. Calvin*, *supra*; *St. Lo Const. Co. v. Koenigsberger*, 84 U. S. App. D. C. 319, 174 F. 2d 25, 10 A. L. R. 2d. 349 (1949); *United States ex rel. Donner Steel Co. v. Interstate Commerce Commission*, 56 App. D. C. 44, 8 F. 2d 905 (1925); *Cromwell v. County of Sac*, *supra*.

In order to apply these general principles in a particular case, it becomes necessary to examine the pleadings in the original action so as to determine whether a particular question was raised and necessarily determined therein. *St. Lo Const. Co. v. Koenigsberger*, *supra*. An examination of the pleadings in appellant's earlier suit compels the conclusion that the issue raised in the instant case was raised earlier and was necessarily involved in the decision of the court.

The complaint in the original civil action alleged that the administrative proceedings and order had denied appellant due process of law (Old J. A. 3). In support of this allegation there was attached to the complaint and incorporated therein as Exhibit "B", a copy of appellant's Petition for Review by the Secretary of State. In Paragraph 4 of the complaint it was alleged that the said Exhibit "B" contained an account of the matters in violation of the Constitution which led up to the issuance of the disciplinary order (Old J. A. 2). Reference to that exhibit discloses numerous allegations of bias and prejudice.

It was alleged that the majority of the Commission "exhibited hostility and prejudice against [appellant] and unmistakable partisanship in favor of the General Counsel" (Old J. A. 60). Appellant charged upon information and



belief that the hostility and partisanship on the part of the Chairman of the Commission was "based on personal malice and bias against [appellant] of so aggravated a nature as to render him unable impartially to exercise his functions \* \* \*." (Old J. A. 60). Indeed, so certain were appellant's convictions in this regard that he stated his readiness to file an "affidavit of bias, malice, and prejudice" against the Chairman with respect to matters occurring prior to the institution of the disciplinary proceeding (Old J. A. 60). Later, he alleged his conviction that the truth was not being sought and that the revocation of his permission to practice before the Commission had been "pre-determined." (Old J. A. 63-64). In at least two other instances he charged that the disciplinary order was a "pre-ordained penalty." (Old J. A. 56). He also alleged that the majority of the Commission had "engaged in concerted tactics" to prevent the third Commissioner from arriving at the truth (Old J. A. 62).

There was also incorporated in the complaint in the original action a petition to the Secretary of State, Exhibit "C", seeking, among other things, reconsideration of the earlier decision (Old J. A. 76-79). In that petition appellant alleged the possession of "newly discovered evidence" of the Commission's "inability \* \* \* to afford [him] due process of law." (Old J. A. 79).

Clearer charges of bias and prejudice would be difficult to include in a complaint for judicial review of an administrative order. It is equally clear that the issue thus raised was disposed of in that case. The Secretary of State did not answer the complaint. Instead he elected to file a motion for summary judgment (Old J. A. 163). The parties were therefore agreed that the case contained no factual issues of material significance. Appellant is correct in stating that the Secretary of State in that action neither admitted nor denied the allegations of bias and prejudice (Appellant's Brief, p. 11). If the allegations are considered as having been denied, factual issues were thereby raised. Since the case was decided upon cross-motions for summary judgment, the factual issues were necessarily treated



by the parties and the Court as immaterial. If, on the other hand, the allegations of bias and prejudice are deemed to have been admitted, the Court upheld the validity of the order in the face of conceded bias and prejudice. In either event the conclusion is inescapable that the effect of bias and prejudice upon the disciplinary order in question was settled. In the face of these allegations, it was necessary for the Court to resolve the question against appellant in order to reach its conclusion.

That the effect of alleged bias and prejudice upon the disciplinary order was not specifically alluded to by the District Court nor by this Court is not significant. In *Calvin v. Calvin, supra*, the plaintiff brought suit to establish ownership to certain property, both real and personal. The District Court found a trust in favor of certain intervening parties and dismissed the complaint. Subsequently, the same plaintiff brought suit to set aside the trust so found upon the theory that it had been obtained by mistake, fraud and duress. This Court ruled that these issues should have been raised by the plaintiff in the original action and were therefore *res judicata*. In disposing of the plaintiff's contention that ownership of the personal property was not decided in the original suit, this Court said:

"Ownership of the personalty was thus put in issue [in the original suit]. Though the Court made no express finding in this regard, the judgment dismissing the amended complaint effected a dismissal with prejudice of her claim therein to personalty." (214 F. 2d at p. 229).

In *St. Lo Construction Co. v. Koenigsberger, supra*, this Court said:

"It is established that for purposes of *res judicata* the pleadings are examined to ascertain the issues involved and determined. It cannot be held that unless a judgment recites the several determinations upon which it is premised, it is not *res judicata* of the issues in the case." (174 F. 2d at p. 27).

To the same effect, *United States v. Interstate Commerce Commission, supra*.

Appellant argues, however, that even if the elements of *res judicata* are to be found in this suit, still the doctrine should not be applied since the order is attacked as being the product of biased Commissioners. In support of this proposition he first equates bias with fraud. He then concludes that the "principle of *res judicata* cannot be invoked to sustain fraud \* \* \* since equitable relief is available against a judgment fraudulently obtained." (Appellant's Brief, p. 13). This principle is obvious. That it is inapposite to this case is equally obvious. The principle cited by appellant stands for no more than that a judgment, itself obtained by fraud, may not be *res judicata* in a subsequent suit. There is no suggestion that the judgment in the prior case was obtained by fraud, or that the District Judge and the Circuit Judges who passed upon the merits of the case were actuated by bias. Upon appellant's theory a person aggrieved by an administrative order which he considers as fraudulently obtained, may attack the order as fraudulent, lose his case, walk from the courtroom to the office of the Clerk of Court, file a new complaint against the same order, and not be foreclosed by the doctrine of *res judicata*. Nothing in the law compels such an absurd result. Indeed, if appellant's theory were correct, the Court's decision in *Calvin v. Calvin, supra*, could not have been as it was since the issue there raised in the second suit was that the trust adjudicated in the first suit was the product of fraud and duress.

## II

**The Commission and the Secretary of State Did Not Abuse Their Discretion in Refusing to Reopen the Administrative Proceedings Inasmuch as Alleged Bias and Prejudice, in the Circumstances of this Case, Did Not Vitate the Disciplinary Order.**

There can be no quarrel with the general proposition that the quasi-judicial proceedings of administrative agencies should be conducted by tribunals possessing an attitude of

judicial detachment. In the instant case, the Commission and the Secretary of State denied appellant's petition to reopen the proceedings not upon the theory that this proposition is not generally true, but upon the theory that an alleged absence of such detachment is not always prejudicial error. It was their position that the alleged bias and prejudice, if assumed, did not vitiate the disciplinary order since it could have had "no practical hurtful consequences on the ultimate outcome of the trial." *National Labor Relations Board v. Air Associates*, 121 F. 2d 586, at 590 (2d Cir. 1941). An analysis of this reasoning in the light of the facts in this case will reveal its soundness.

The record in appellant's case before the administrative agency consisted of uncontradicted testimony and documentary evidence. This state of affairs was the result of appellant's intentional refusal to participate in the proceedings. Upon this uncontradicted record, the Commission unanimously agreed that appellant had been guilty of violating the canons of professional ethics. But the decision of the three members of the Commission did not constitute the agency decision. Section 303.26 of the Commission's rules of practice<sup>5</sup> gave appellant the right to appeal the Commission's decision to the Secretary of State. In such a case, the decision of the Commission is merely a recommendation.<sup>6</sup>

However, in the interest of fairness to the appellant, the Secretary did more than he was required to do. The entire record of the administrative proceedings was submitted to a special committee of the District of Columbia Bar Association. Three eminent members of the local bar carefully considered the record. It was their unanimous opinion that appellant had been guilty of unprofessional con-

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<sup>5</sup> 22 C.F.R. 303.26.

<sup>6</sup> 22 C.F.R. 303.27 provides: "The Secretary of State will make the agency decision in each case in which an appeal has been taken from the decision of the Commission as provided in Section 303.26. In making such decision, the Secretary of State will review the whole record or such portions thereof as may be cited by any party to permit limiting of the issues."

duct. Following the bar committee's report to him, the Secretary reviewed the entire record and affirmed the decision of the Commission. The District Court in *Herman v. Acheson*, *supra*, and this Court, in *Herman v. Dulles*, *supra*, affirmed after a review of the evidence of record. This Court pronounced the evidence sufficient.

Appellant thus finds himself in precisely the same position as was the respondent in *Air Associates*, *supra*. Here, as there, the agency decision was not made by the allegedly biased commissioners.<sup>7</sup> Here, as there, the agency decision was not a mere "rubber stamp" approval of the recommended decision of the Commissioners but was the product of scrupulous, independent consideration of the record. Here, as there, the alleged bias of the hearing officers "could have no practical hurtful consequences on the ultimate outcome of the trial." (121 F. 2d at p. 590).

This was not a close case. The facts upon which the decision was based were undisputed. In *National Labor Relations Board v. Western Cartridge Co.*, 138 F. 2d 551 (2d Cir. 1943), the record made at the administrative level was not close. There, in defending an action to enforce the Board's order, the respondent alleged that the order was void by reason of the trial examiner's bias. In disposing of this objection, the Court said:

"\* \* \* he [trial examiner] did much to destroy any faith in his impartiality and had this been a close case his conduct might have been sufficient cause for a denial of this petition. \* \* \* The result was right and though the examiner's conduct may have caused the respondent needless trouble and expense, whatever harm was done to the cause of good administration of the Act did not make the order itself erroneous." (138 F. 2d at p. 552).

The uncontradicted evidence in this case has not only received the concededly unbiased scrutiny of the Secretary

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<sup>7</sup> It was this very theory which prompted the appellant to file with this Court a motion to dismiss this appeal for mootness and vacate the judgment of the District Court.

of State, who rendered the agency decision, a special committee of the District of Columbia Bar Association, the United States District Court, and this Court, but has also received the attention of the members of the Commission who succeeded the Commissioners alleged to have been biased. It has not been suggested that any of these reviewers are actuated by any bias against appellant. In the face of the unanimous agreement of so many unbiased reviewers of the record, it is impossible to find any injury which the alleged bias might have worked. It therefore follows that the decision not to reopen the proceedings is a reasonable decision and does not amount to an abuse of discretion.

#### CONCLUSION

The decision of the District Court is clearly correct. It is obvious that the legal issue raised in this case was very emphatically raised in the prior litigation and was necessarily resolved therein. In any event, on the merits of the issue thus raised, no practical harmful consequences could have resulted from the presence of bias and prejudice at the lowest administrative level. This Court should not, therefore, burden the agency with the needless task of conducting a new hearing where the same evidence would necessarily lead to the same result.

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

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IN THE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 12,279**  
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SAMUEL HERMAN, *Appellant*,

v.

WHITNEY GILLILLAND, PEARL CARTER PACE and HENRY J.  
CLAY, as members of the Foreign Claims Settlement  
Commission of the United States, *Appellees*.

—  
**Appeal from the United States District Court  
for the District of Columbia**  
—

**REPLY BRIEF**  
—

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IN THE  
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**Appeal from the United States District Court  
for the District of Columbia**

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**REPLY BRIEF**

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Seeking to avoid the impact of the great body of law, including decisions of this Court, as to the effect of bias, prejudice and malice, the Government devotes the bulk of its brief to the contention that the "agency decision" was that of the unbiased Secretary of State not that of the concededly biased Commissioners. It concludes that "no practical hurtful consequences" could have resulted from

the presence of bias and prejudice at the "lowest administrative level."

We need not reiterate the substantial harm caused appellant by the issuance of a prejudiced agency decision invoking the severest possible penalty within the Commission's power. It is interesting to note, however, the Government's readiness completely to reverse its position before this Court in this very appeal when and as it suits its purpose. The Government's evident purpose, at this stage of the case, is to minimize the role of the prejudiced Commission and to aggrandize the role of the unprejudiced Secretary of State. But on July 28, 1954, before this Court, the Government had an opposite purpose. Opposing, on that date, appellant's motion to dismiss the appeal on the ground of mootness, the Government, because it was then crucial to its argument, contended that there was no question but that the "agency decision" was that of the Commission. Apparently this Court agreed with the Government's prior position. Because it is now crucial to its argument, as it thinks, to take the opposite position, the Government reverses itself and contends that the "agency decision" was that of the Secretary of State.

Quotations from the Government's memorandum filed in this Court on July 28, 1954 and quotations from the Government's present brief filed October 15, 1954 follow (*italics supplied*):

*Government's  
Memorandum of July 28,  
1954*

"The order under review in this action is *not the order of the Secretary of State but is the order of the Commission . . .* the consideration of this appeal by the Secretary of State, resulting in its affirmance, clearly left *the order that of the Commission . . .* Section 303.27 [of the Commission's Rules] provides that the decision of the Secretary of State is the 'agency decision,' i.e., *the decision of the Commission . . .* It is submitted that there can be no dispute that the order under review in this action is *the order of the Commission . . .* " (Pp. 3-4.)

*Government's  
Brief of October 15, 1954*

"But the decision of the three members of the Commission *did not constitute the agency decision . . .* the decision of the Commission is merely a recommendation [quoting Sec. 303.27 of the Commission's Rules] . . . the agency decision *was not made* by the allegedly biased commissioners . . . the agency decision was not a mere 'rubber stamp' approval of the recommended decision of the Commissioners . . . the concededly unbiased scrutiny of the Secretary of State *who rendered the 'agency decision' . . .* " (Pp. 9-11.)

One would assume from the above that the Government's contentions of July 28, 1954 had been overruled by this Court. On the contrary, as stated, the Government, after oral argument on July 31, 1954, prevailed, on August 11, 1954, when this Court, by per curiam order without opinion, denied appellant's motion to dismiss on the ground of mootness. This Court, it must be assumed, in ruling for the Government, agreed with the Government that the "agency decision" had been that of the Commission. Yet the Government, seeking, at the final stage, to prevail on the merits of the appeal itself shows no hesitancy in reversing itself. We submit that this is unconscionable and illustrates the Government's extremity in attempting, come what may, to sustain an untenable position.

But this alone does not suffice: Having, by reversing its position, taken the new position that the Secretary of State rendered the "agency decision," the Government attempts to bolster this new position by claiming that the Secretary of State "reviewed the record" (Brief, pp. 3, 10), with "unbiased scrutiny" (Brief, pp. 10-11), prior to affirming the Commission on July 3, 1952. The fact of the matter is that the Secretary of State acted solely on the recommendation of an advisory committee of the District of Columbia Bar Association that the Administrative Procedure Act of 1946 did not apply to the administrative disciplinary proceedings. The Secretary of State did not review the record. The text of the Secretary's order of July 3, 1952, is set out as Exhibit "A" to the complaint in the first action. It states merely: "There is enclosed a copy of the opinion of the advisory committee appointed by the Secretary of State *to review the record* and recommend a decision. . . . In accordance with the recommendation of the committee, the order of the International Claims Commission has been affirmed." (Italics supplied). This is again repeated in Exhibit "D" to the complaint wherein it appears that on July 10, 1952, the Department of State advised appellant that the "Acting Secretary's order [of July 3, 1952] was based upon the recommendation of the advisory committee." It is clear that the Secretary of State did not review the record prior to his affirmance order of July 3, 1952.

And again this does not suffice: The Government further misstates the facts when it claims (Brief, p. 3) that the Commission issued *unanimous* findings. The prejudiced Commissioners issued one set of findings; the unprejudiced Commissioner another. The prejudiced Commissioners ordered appellant's right to represent claimants forever revoked; the unprejudiced Commissioner recommended censure (J.A. 3).

It is apparent from its brief on the question of the effect of bias and prejudice, that the Government, in reality,

stakes its case upon the doctrine of *res judicata*. It urges this Court not to consider this appeal on its merits and its final word to this Court is that it not burden the agency "with the needless task of conducting a new hearing." But a new hearing would be a fair hearing and a fair hearing would show the truth. As Justice Rutledge said, dissenting in *Angel v. Bullington* (1946), 330 U.S. 183, 203, 204:

"It is not every case in which a litigant has had 'one bite at the cherry' that the law forbids another . . . In other words, it is not every such case in which the policy of stopping litigation outweighs that of showing the truth . . . Upon the law as well as the policy, the question has been one of balancing considerations of justice and convenience between stopping litigation and stopping the showing of the truth . . ."

Pleading that this Court stop the litigation and thereby stop the showing of the truth, the Government requests this Court "to take judicial notice of the record on appeal" in the first litigation and quotes stray phrases from the so-called "Old J.A." We have no fear as to what the "Old J.A." will reveal as to whether conceded bias and prejudice was, or could have been, an issue in that case, and whether the issue was adjudicated. We point out to this Court that appellant's Petition for Review by the Secretary of State, from which the Government quotes, was a lengthy document of over 60 pages and that the Government has improperly cited a few phrases out of context to attempt to convince this Court that an issue of the effect of conceded bias and prejudice had been raised when in fact it had not. In one instance, the method and purpose of quotation appears to us to be highly misleading and improper.<sup>1</sup> If the issue of bias and prejudice

<sup>1</sup> Thus on page 6 of its Brief to support its statement that a "clearer charge [s] of bias and prejudice would be difficult to include in a complaint for judicial review of an administrative order," the Government states as to the petition for rehearing to the Secretary of State, "appellant alleged the possession of 'newly discovered evidence' of the Commission's 'inability . . . to afford [him] due process of law.' (Old J.A. 79)."

That this is a misquoted and wholly inapplicable quotation is apparent when



had been raised before the Secretary of State, how did he dispose of it? Exhibit "D" to the complaint in the first action shows that the Secretary of State affirmed because he adopted the recommendation of the advisory committee of the District of Columbia Bar Association that the Administrative Procedure Act did not apply. The Secretary neither alluded to nor passed upon an issue of bias and prejudice. There was in fact no such issue in the first action. The recommendation of the advisory committee (Exhibit "A" to the complaint in the first action) was likewise wholly silent as to any so-called "issue" of bias and prejudice.<sup>2</sup> The briefs and arguments

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the full context of the quotation—pertaining, as is apparent, to the refusal of the Commission to rule on the applicability of the Administrative Procedure Act of 1946—is read (the Government's quotation is italicized):

"On the key question of the applicability of the Administrative Procedure Act of 1946, petitioner respectfully requests an opportunity to submit, in addition to a memorandum of authorities, newly discovered evidence as to the views, as to the applicability of that Act to this very case, expressed before Congressional committees by the Chairman of the International Claims Commission, the Deputy Under Secretary of State, and the Chairman of the Judiciary of the United States Senate, one of the authors and sponsors of the Administrative Procedure Act of 1946. The Deputy Under Secretary of State and the Chairman of the Committee on the Judiciary of the United States Senate expressed their views on the public record, that the Administrative Procedure Act of 1946 should have been applied to the proceedings before the International Claims Commission of the United States in this case. The Chairman of the International Claims Commission of the United States, in the same record, challenged the applicability of that Act.

"Similarly, petitioner requests an opportunity to submit *newly discovered evidence* as to the views expressed before Congressional committees by members of the International Claims Commission demonstrating the *inability* of the majority of such Commission to *afford* petitioner the guaranties of *due process* under the Constitution of the United States and the Administrative Procedure Act of 1946."

<sup>2</sup> The advisory committee's recommendation was as follows: "As we see it, you have a choice between two alternatives:

- (a) Affirm the order of the International Claims Commission. This would expedite a judicial determination as to the applicability of the Administrative Procedure Act. If the Act is held to apply as in the adjudication of claims, the court could do no more than remand the case to the State Department for further proceedings.
- (b) Vacate the present order and, through the Department's Legal Adviser, initiate new proceedings against the Respondent. Should this course be followed, an opportunity would be afforded to amend the Regulations adopted January 17, 1952, if in any respect they are deemed inconsistent with the Administrative Procedure Act.

Neither alternative is free from difficulties. All the circumstances considered however, two members of the committee recommend alternative (a), and one recommends alternative (b)."

of both parties before the District Court and this Court, and the opinions of both courts in the first action, were wholly silent as to any so-called "issue" of bias and prejudice. The only reasonable conclusion to be drawn from this silence and total absence of reference is that there had been no "issue," nor could there have been, of bias and prejudice in the first action.

We submit, further, that the Government's formal request, made in the course (Brief, p. 2) of its counter-statement of the case, that this Court "take judicial notice of the record on appeal" in the first litigation, is inexpedient and unjust, under the circumstances, considering what it is that the Court is asked to notice, and while we think that should this Court accede to the request nothing of comfort to the Government could be found, we do not join in the request.

The request is made at the last moment to an appellate court. It was not made to the District Court. Judicial notice cannot be resorted to for the purpose of supplementing the record in these circumstances. The Government has had ample opportunity to make the material it desires noticed part of the record in this case. The Government is not warranted in now sending the members of this Court into a search of lengthy past records for quotations whose meaning, purpose and purport are, at this point in the case, disputable at the very least. The Government did not introduce into the record of this action, before the District Court, the pleadings which it now cites before this Court so that the District Court could determine what was within the issues and determinations of the first action. This it was required to do (30 *Am. Jur., Judgments*, Sec. 284). Had it done so, appellant would have responded in proper manner, thus exercising an opportunity to which he was entitled, to overcome the effects of the Government's view as to what the record shows. *Funk v. Commissioner of Internal Revenue*, 163 F. 2 796, 800, 801, 802 (3d Cir., 1947); Morgan, E. M.,

*Judicial Notice* (1944), 54 Harv. L. Rev. 269, 293. In fact, the District Court expressly refused to sign an order making findings, despite the request of the Government, either that the elements of *res judicata* existed or that the judgment in the first action was *res judicata* as to the issues in the second action (J.A. 15-16).

The Government's reasoning leads to strange results. On the Government's premise that the effect of bias and prejudice was in issue in the first case, how had the issue been determined? The first case had been decided on cross-motions for summary judgment. According to the Government (Brief, pp. 6-7), therefore, the District Court and this Court had either (1) considered that conceded bias and prejudice was immaterial; or (2) upheld the validity of an administrative order in the face of conceded bias and prejudice. Each of these conclusions will doubtlessly astonish this Court. To reach its end, the Government would have this Court believe that *sub silentio* the first case held, and this Court *sub silentio* affirmed, that conceded bias and prejudice, a matter striking at the very foundation of American justice in the quasi-judicial, as well as in the judicial, process, is "immaterial" where the very question in the case was whether a fair and lawful hearing had been afforded; or that *sub silentio* this Court affirmed, that conceded bias, prejudice and malice by an adjudicating agency was harmless thereby reversing, nullifying or setting aside, without reference or comment, the array of authorities, including the decisions of this Court and the Supreme Court, cited by appellant in his brief in this action. No such startling conclusions are demanded if the premise is accepted—a premise, we submit, to be wholly correct—that the question was not nor could have been in issue in the first case and had not been and could not have been decided, and that the issue as to the effect of conceded bias and prejudice first arose as a result of an independent proceeding based

on newly discovered evidence brought by appellant under the Commission's Rules.

We respectfully submit that the judgment of the District Court should be reversed.

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IN THE  
**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals  
For the  
District of Columbia Circuit*

\_\_\_\_\_  
No. 12,279

**FILED** JAN 28 1955

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SAMUEL HERMAN, *Appellant*,

*Joseph W. Stewart*  
**CLERK**

v.

WHITNEY GILLILLAND, PEARL CARTER PACE and HENRY J.  
CLAY, as members of the Foreign Claims Settlement  
Commission of the United States, *Appellees*.

\_\_\_\_\_  
**Appeal from the United States District Court  
for the District of Columbia**

\_\_\_\_\_  
**PETITION FOR REHEARING**

\_\_\_\_\_  
The basic issue in this case, i.e., the effect of conceded bias, prejudice and malice in quasi-judicial officials, is of grave import. This Court has now held, by brief per curiam opinion, that the matter is *res judicata*. We respectfully submit that this Court has apparently overlooked highly material and uncontroverted facts of record which have a vital bearing upon the ultimate judicial review and reso-



lution of the issues. In our view, the Court's statement of the facts cannot but convey an impression that is, no doubt, inadvertently erroneous. As rendered, the present per curiam opinion does not reflect, nor can it be determined:

1. That an independent action was commenced before the appropriate administrative body under a specific provision of its rules (JA 4) *after* the first action in the courts; that the administrative body accepted jurisdiction; conceded that the evidence was newly discovered; conceded that bias, prejudice and malice could be established; did not bar the action because of *res judicata*; but, nevertheless, refused to afford a new hearing on the merits on arbitrary and capricious grounds (JA 5).

2. That, subsequently, an action was brought in the District Court under the Administrative Procedure Act (JA 2, 5) to review an administrative order of the Secretary of State dated November 19, 1953 (JA 5) on the ground that such order was arbitrary, capricious and an abuse of discretion. The District Court granted a preliminary injunction but denied a permanent injunction.

3. That the District Court did not, nor could it, review the newly discovered evidence to determine whether it was either newly discovered, or acceptable proof of bias, prejudice and malice; but that the issue before it was whether it was arbitrary and capricious, in the face of the conceded bias, prejudice and malice, for an administrative agency to deny a new administrative hearing (JA 2-11) upon the merits.

In summary, there is no reference in this Court's per curiam opinion to the administrative foundation and underpinning of this case, without which there is no case, nor to the Commission's order of September 14, 1953 and the Secretary of State's order of November 19, 1953. Both of these orders were *after* the first court action and were the very occasion and basis for the second court action. It is respectfully submitted that the carefully established and uncontroverted facts of record do not support this Court's

statement that the "present case is like the former case". A full and correct finding of fact is of crucial importance, on further appellate review, in determining the applicability of the general rule that *res judicata* is no defense where between the time of the first judgment and the second there has been an intervening decision creating an altered situation. (Brief for Appellant, p. 12.)

When the basic and operative facts of this case are fully stated and taken into account, we are confident that *Calvin v. Calvin*, U.S. App. D.C. , 214 F. (2) 226, 228 (1954) relied upon by this Court, will be found inapplicable. A new and independent administrative proceeding, specifically provided for by the Commission, and not barred by *res judicata*, resulted in an administrative order which conceded bias, prejudice and malice but held it to be of no effect, not on the ground of administrative necessity, which could not apply, but on the wholly inapplicable ground of *National Labor Relations Board v. Air Associates*, 2 Cir. 1941, 121 F. (2) 586. The subsequent review by the District Court was of that administrative order. We respectfully urge this Court to reconsider whether its per curiam opinion fully and accurately reflects the case absent findings or opinion in the District Court.

We therefore respectfully petition the Court for rehearing.

We certify that this petition is made in good faith and not for delay.

Respectfully submitted,

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